(24,741)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 135.

HENRY D. McDONALD, PLAINTIFF IN ERROR,

vs

F. A. MABEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print
Transcript from the county court of Lamar county	1	1
Caption	1	1
Plaintiff's original petition	1	1
Defendant's original answer	3	2
Plaintiff's first supplemental petition	6	4
Defendant's first supplemental answer	10	7
Judgment of the court	14	9
Motion for new trial	14	9
Order on motion for new trial	16	10
Request to file conclusions of fact and law	16	10
Findings of fact and conclusions of law	17	11
Appeal bond	26	17
Assignment of errors	27	18
Certificate of clerk	30	20
Bill of costs	31	20
Proceedings in the court of civil appeals	33	22
Opinion, Levy, J.	33	22
Opinion, Hodges, J., dissenting	41	27
Judgment	57	36

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1916.

	Original.	Print
Appellee's motion for rehearing	61	38
Opinion on motion for rehearing, Levy, J.	66	40
Order overruling motion for rehearing	67	41
Petition for writ of error	68	42
Order granting writ of error	74	45
Bond for costs	75	46
Waiver of citation	76	47
Order of submission	76	47
Opinion, Hawkins, J.	77	48
Opinion, Brown, C. J., and Phillips, J.	152	87
Judgment	153	87
Bond on writ of error	154	88
Summary of costs	155	89
Clerk's certificate	156	89
Petition for writ of error and allowance	157	89
Writ of error	158	90
Citation and service	159	91
Assignment of errors	160	92

1 *Caption.*

THE STATE OF TEXAS,
County of Lamar:

Be it remembered that at a term of the County Court, begun and hoden at Paris, Texas, within and for Lamar County, before the Hon. Leslie L. Hardison, and ending on the 6th day of August, A. D. 1910, the following case came on for trial, to wit:

HENRY D. MCDONALD
VS.
F. A. MABEE.

Plaintiff's Original Petition.

Filed June 5th, 1909.

In the County Court of the State of Texas, in and for the County of Lamar, July Term, A. D. 1909.

No. 2983.

To the Honorable Judge of said Court:

The petition of Henry D. McDonald, who resides in the County of Lamar in the State of Texas, Plaintiff, against F. A. Mabee, defendant, who resides without the State of Texas, respectfully shows that heretofore, towit: on the 6th day of March, 1891, said Defendant together with one, D. P. Hollon, which latter is not sued herein, made, executed and, for a valuable consideration delivered unto your petitioner their certain Promissory Note in writing, whereby on the 6th day of March, 1892, they promised to pay Plaintiff or order the sum of Three Hundred Dollars with 12 per cent interest per annum from the date thereof, to wit, March 6th, 1891, until paid, together with 10 per cent. attorney's fees if collected by
2 law, said note reciting that the same was the 2nd and only deferred payment for a certain tract of land in the Henry Stoneham Headright Survey in Lamar County, Texas, that day deeded to said Mabee and Hollon and upon which they thereby acknowledged said note to be a vendor's lien until the same was paid in full, and therefore, they undertook and promised to pay to your petitioner who is the legal owner thereof, the amount of money and interest in said Promissory note specified, according to the terms and tenor thereof. But though said sum of money is long since due and still unpaid, the makers thereof, though often thereunto afterwards requested, have wholly refused and failed to pay the same or any part thereof except the sum of $19.45 paid on Oct. 2nd, 1894, which credit is endorsed on said note.

Plaintiff further shows that through said default of said Mabee and Hollon he has been compelled to resort to law to collect said note and to employ attorneys for that purpose, that he has agreed to pay said attorneys 10 per cent. on the amount of said note and interest as their fee for said purpose and that such per cent. is a reasonable and customary compensation for such services, said attorneys being the firm of Moore & Park, whose names are signed hereto.

Plaintiff further shows that the said D. P. Hollon is actually insolvent, for which reason he is not sued, and that the defendant F. A. Mabee is now temporarily residing in Nueces County, Texas, and that he is the owner of land in said Nueces County and also in Duval County, Texas, to which two Counties plaintiff prays for the issuance of *of* writs of attachment in accordance with the affidavit and bond therefor filed simultaneously with this petition, and he also prays for citation for said Mabee to said County of Nueces.

And on final he-reing hereof, plaintiff prays for judgment
3 against defendant, F. A. Mabee for the amount of money in said note mentioned, interest, attorneys' fee and cost of suit, and for all relief, general and special.

MOORE & PARK,
Attorneys for Plaintiff.

Filed June 5th, 1909. Sam C. Johnston, Co. Clerk, by James L. Baxter, Deputy.

Defendant's Original Answer.

Filed March 14th, A. D. 1910.

In the County Court of Lamar County, Texas.

No. 2983.

HENRY D. MCDONALD
vs.
F. A. MABEE.

Comes defendant F. A. Mabee, and for Original Answer in this cause:

1.

Demurs generally to plaintiff's allegations in his original petition herein, because insufficient in law to sustain the relief therein sought. And of this defendant prays judgment.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Defendant.

2.

Specially excepts to all of that portion of plaintiff's said petition wherein it is alleged "that the said defendant, together with one

D. P. Hollon, which latter is not sued herein, made, executed and, for a valuable consideration, delivered unto your petitioner their certain promissory note in writing, whereby on the 6th day of March, 1892, they promised to pay plaintiff or order the sum
4 of Three hundred dollars with 12 per cent interest per annum from the date thereof, to wit: March 6th, 1891, until paid, together with 10 per cent attorney's fee if collected by law"; and likewise specially excepts to all portions of such petition as set out the said note above and seek to recover against defendany by reason thereof. Because such allegations and pleading show upon their face that more than four years have passed since the said note became due, and since the cause of action if any, accrued thereon, and that the same are long since barred by the statute of four years' limitation of the State of Texas governing and limiting the institution of actions of this nature, as set out in Article 3356 of Chapter Two of Title 67 of the Civil Statutes of Texas.

Wherefore, defendant says plaintiff's note and cause of action if any, are long since barred by the said statute of four years' limitation which defendant now and here pleads and relies on as a defense and bar to this action.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Defendant.

Answering generally, of required to answer further, defendant denies all and singular the allegations contained in plaintiff's pleadings, and demands strict proof of them.

4.

Answering specially, defendant says that the note set out in plaintiff's original petition herein, and upon which judgment is sought against defendant in this action, was executed to plaintiff by defendant and D. P. Hollon on the 6th day of March, 1891, and by its terms became due and payable on the 6th day of March, 1892, just as plaintiff has alleged in his original petition filed in
5 this cause, June 5th, 1909; that from the date of the maturity of said note, to-wit: March 6th, 1892, until the institution of this suit, on to-wit: June 5th, 1909, more than 17 years have passed, and the said note and plaintiff's cause of action, if any by reason of its execution, are long since barred by the said statute of four years' limitation of the State of Texas.

Wherefore, defendant here and now pleads and relies upon the said statute of four years' limitation as a complete defense and bar to this suit and to any cause of action plaintiff may have had by reason of said note sued on herein, and asks that he go hence with his costs.

5.

For further special answer, defendant alleges that plaintiff on October 3rd, 1893, obtained judgment against this defendant and the said D. P. Hollon in the District Court of Lamar County, Texas, in cause No. 5467, for $431.97, being the principal, interest and at-

torney's fees on the note sued on in the above cause No. 5468, and likewise in said cause, recovered his judgment against the said D. P. Hollon and this defendant foreclosing the vendor's lien existing by reason of such note upon a certain tract of 267 acres of land in the Henry Stoneham Survey in Lamar County, Texas, which had been conveyed by the said H. D. McDonald; that the note upon which judgment was rendered in said cause No. 5468 against this defendant and D. P. Hollon and in favor of plaintiff, H. D. McDonald was and is one and the same note as that set out and relied upon in the petition of plaintiff in this suit; that in said cause No. 5468, W. C. Thompson and Guy L. Thompson were made parties defendant as claiming some right to or interest in certain of the lands upon which plaintiff sought to fix and establish his lien, but no judgment was rendered against them except as affected their rights in such
6 lands. The above judgment has never been appealed from by this defendant or by the other defendants therein, and is final, and of record in book 12, pages 607 to 610, of the record of judgments of the District Court of Lamar County, Texas.

Defendant says that plaintiff is now seeking in this action to recover judgment against this defendant upon a note and cause of action which have long since been merged into a valid and final judgment, to-wit: The said judgment rendered in favor of plaintiff in the said cause No. 5468 in the District Court of Lamar County, Texas, in which judgment the cause of action set out in litigation was finally adjudicated and decided, and the note sued on herein and set out in plaintiff's petition thereby became and is res adjudicata.

Wherefore, defendant, pleading and relying upon said former judgment, merger and adjudication as a complete defense and bar to this suit, asks that he go hence with his costs.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Defendant.

Filed March 14th, 1910: Sam C. Johnston, Clerk County Court, Lamar County, Texas, by James L. Baxter, Deputy.

Plaintiff's First Supplemental Petition.

Filed March 14, 1910.

In the County Court, Lamar Co., Texas.

#2983.

HENRY D. MCDONALD
vs.
F. A. MABEE.

Now comes the plaintiff and by leave of the court files this
7 his first supplemental petition in response to the defendant's original answer filed 14th day of March, 1910, and for reply

to all those portions of said original answer, whether by general demurrer, special exceptions or plea in bar setting up and pleading the statute of limitations of four years to plaintiff's cause of action, says that the defendant was a citizen and resident of the State of Texas at the time of the execution of the note sued on, at the maturity of same and for a short time thereafter, to-wit, for the period of two months thereafter, but that immediately thereafter, to wit, on the 6" day of May, 1892, said defendant ceased to be a citizen or resident of the State of Texas and changed his citizenship and residence and removed to the State of Missouri where he has resided continuously and uninterruptedly up to the present time, and that said defendant has so been without the limits of the State of Texas during all the time during which plaintiff's cause of action might have been maintained except for the period of two months during which the defendant has been temporarily in the State of Texas on one or two visits to Lamar County, Texas, and on two or three visits to Nueces County, Texas, in which latter County he was residing on a temporary visit at the time of the institution of this suit.

But should it appear that the defendant has, since the Plaintiff's said cause of action accrued, been within the State of Texas for a longer period than two months, as aforesaid; or for as long a period, adding together all his return to Texas, as more than four years next after the maturity of said note and prior to the filing of this suit, then plaintiff says that none of such returns was ever actually known to plaintiff; nor was any of the same so notorious and protracted,
and so identified with any locality, that plaintiff could by
8 reasonable diligence have learned of such returns; nor could
by like diligence, after such returns could have been learned, have subjected him to the jurisdiction of this or any other court in Texas.

Wherefore plaintiff says his cause of action is not barred by limitation as claimed by defendant, and he prays as in his original petition.

MOORE & PARK,
Attorneys for Plaintiff.

And for reply to that part of the Defendant's answer, beginning paragraph 5 thereof, setting up the fact that on the 3" day of October, 1893, plaintiff obtained in the District Court of Lamar County, Texas, in cause No. 5468 in a certain suit wherein this plaintiff was plaintiff and the defendant together with three other persons, towit: D. P. Hollon, M. C. Thompson and Guy L. Thompson were defendants, a judgment for $431.97 against defendant herein and the said D. P. Hollon on and for the note sued on herein, and pleading said judgment as a merger of said note and cause of action therein and as res adjudicata of the same; this plaintiff says: that at the time of the institution of said suit, the defendant herein was actually non-resident of the State of Texas, but erroneously supposing him then to be a resident of the State of Texas, plaintiff so alleged in his original petition in said suit and citation was issued in pursuance of such allegation to Lamar County, Texas, for said defendant, but that upon the Sheriff's return thereon being made showing the defend-

ant to be out of the State of Texas, plaintiff filed an affidavit in said cause that said defendant was absent from the State of Texas and praying that he be cited by publication; that such citation was thereupon issued and published according to law, and there-
9 after in, and according to due course of law such proceedings were had in said cause that on, towit, the 3" day of October, 1893, judgment was rendered in plaintiff's favor against all the defendants, that is to say; against the defendants, Mabee and Hollon for the amount of the note sued on, including interest and attorney's fees, amounting to said sum of $431.97, and against the defendant's M. C. and Guy L. Thompson, alleged to be claiming some interest in the land on which a lien was sought to be enforced, cutting off any such claim as against plaintiff's prior right; that the record in said cause shows that said defendants, Mabee and M. C. and Guy L. Thompson had been cited by publication only and the judgment therein, which defendant now pleads as a merger and res adjudicata, shows on its face that fact and that it was rendered upon such service and upon that only, while the defendant therein, D. P. Hollon was personally served with process and said record and judgment so show on their face.

Plaintiff further shows to the Court that the credit of $19.45 to which the note sued on is alleged in the original petition to be entitled is the amount of net credit to which said judgment was entitled out of the proceeds of the foreclosure sale of the 267 acres of land on which said judgment was a foreclosure of the vendor's lien, after the payment of all the costs of said suit, and same was entered and credited as of the date of such sale, and the same is the only credit to which said note is entitled. Plaintiff says that by reason of the facts therein stated, said judgment was rendered duly upon service by publication and not otherwise, that the same is not and never was a personal judgment against the defendant herein, and is in no sense binding on him personally so as to be of any force or effect, and never had any force or effect except as a means of reaching and enforcing plaintiff's said vendor's lien on the said
10 267 acres of land, and that by reason of the facts stated herein, all of which are shown on the fact of the judgment and record in said cause No. 5468, the said note and cause of action accruing therein in said cause and in this case sued on, was not merged in said judgment rendered in said cause No. 5468 and said judgment is not res adjudicata, but said note remains as a valid and subsisting note and cause of action against the defendants entirely unaffected by said judgment or any proceedings had thereunder or in connection therewith.

Wherefore, plaintiff prays as in his original petition.

MOORE & PARK,
Attorneys for Plaintiff.

Filed March 14th, 1910; Sam C. Johnston, Clerk County Court, Lamar County, Texas, by James L. Baxter, Deputy.

Defendant's First Supplemental Answer.

Filed August 3rd, A. D. 1910.

In the County Court of Lamar County, Texas.

No. 2983.

HENRY D. MCDONALD
VS.
F. A. MABEE.

Comes defendant and by leave of court files his first supplemental answer in reply to plaintiff's first supplemental petition filed the 14th day of March, 1910; and

11

1.

Specially excepts to that portion of plaintiff's first supplemental petition included in his reply to defendant's plea of limitation, wherein plaintiff alleges want of actual knowledge of any returns of defendant to the State of Texas since the accrual of the plaintiff's cause of action for as long a period adding together all such returns, as more than four years next after the maturity of said note and prior to the filing of this suit, or that such returns were so notorious and protracted and so identified with any locality that plaintiff could by reasonable diligence have learned of such returns or could by like diligence after such returns could have been learned, have subjected him to the jurisdiction of this or any other Court in Texas. Defendant's rights under the law to have the time spent by him within the State of Texas after the accrual of plaintiff's cause of action and prior to the institution of this suit, computed in support of his plea of limitations is not dependent upon or in any wise affected by the existence or non-existence of any of the facts alleged by plaintiff and herein excepted to. Defendant's said plea of four years' limitations must under the laws stand or fall, in so far as his absence from the State of Texas is concerned, upon the length of time he has spent in Texas since the maturity of Plaintiff's said note upon which this suit is brought and prior to the filing of this suit.

2.

Specially excepts to the following allegations contained in plaintiff's reply to defendant's plea of res adjudicata; "This plaintiff says: That at the time of the institution of said suit, the defendant herein was actually a non-resident of the State of Texas." The purpose and effect of this allegation is to attack in a collateral proceeding by evidence outside of its record the judgment in said cause No. 5468, of the District Court of Lamar County, Texas, which is a court of record and of general jurisdiction and under the Constitution and laws of Texas.

12 3.

Specially answering, defendant denies that as alleged by plaintiff in his first supplemental petition, he, on the 6th day of May, 1892, ceased to be a resident or citizen of the State of Texas and changed his citizenship or residence and moved to the State of Missouri, where he has resided continuously and uninterruptedly up to the present time; and likewise denies that he has so been without the limits of the State of Texas during all the time during which plaintiff's cause of action might have been maintained, except for the period of two months during which he was temporarily in the State of Texas.

On the contrary, defendant alleges that he was a citizen and a resident of the State of Texas on the 6th day of May, 1892, and remained so until during the year 1894. He likewise alleges that since the maturity of the note sued on by plaintiff in this action and prior to the filing of this suit he has been at various and sundry times in the State of Texas for periods of varying length of time aggregating more than four years. He further alleges that his said returns to and stays within the State of Texas included the City of Paris, Lamar County, Texas, the cities of Waco, Houston, San Antonio, Corpus Christi, Fort Worth, Dallas and others of the cities of Texas, where he lived openly and without concealment and in such manner that plaintiff could by reasonable diligence have learned of his stay within the State of Texas, and could by like diligence thereafter have subjected him to the jurisdiction of this or any other Court in Texas.

Wherefore, defendant here and now renews and relies upon his original plea of the statute of limitations of four years to plaintiff's cause of action.

13 4.

Further specially answering, defendant alleges that at the time of the institution by plaintiff in the District Court of Lamar County, Texas, of the cause No. 5468 plead by defendant as res adjudicata to this action, defendant was a resident of the State of Texas and then within Lamar County in said State; that at the time citation was issued out of said cause as alleged in plaintiff's first supplemental petition, defendant was likewise a resident of the State of Texas and within the County of Lamar in said State; that at the time plaintiff filed in said cause No. 5468 his affidavit that defendant was absent from the State of Texas, and praying that he be cited by such publication *was* thereupon issued and published, as is alleged in plaintiff's first supplemental petition, defendant was a resident of the State of Texas. Defendant alleges that in said cause No. 5468 as is shown by the record therein, a personal judgment was rendered in favor of plaintiff against defendant for the amount set out in Plaintiff's first supplemental petition, and at the time of the rendition of such judgment defendant was a resident of the State of Texas. And as to the matters hereinabove alleged, defendant denies each and every allegation in plaintiff's first supplemental petition to the contrary.

Wherefore, defendant here and now renews and relies upon his former plea of res adjudicata and prays as in his original answer.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Defendant.

Filed August 3rd., 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy.

14 *Judgment of the Court.*

In County Court, Lamar County, Texas, July Term, August 3", 1910.

No. 2938.

HENRY D. MCDONALD
vs.
F. A. MABEE.

On this day this cause came on regularly for trial and came both parties, plaintiff and defendant and announced ready for trial. No jury being demanded the matters of fact as well as of law were submitted to the Court, who, after hearing the pleadings, evidence and argument of counsel, and being fully advised thereon is of the opinion that both the law and the facts are in favor of defendant, and that judgment should be rendered against the plaintiff and for the defendant, F. A. Mabee.

It is therefore ordered, adjudged and decreed by the Court that plaintiff Henry D. McDonald take nothing by reason of this prosecution, and that defendant F. A. Mabee go hence without day to have and recover of Plaintiff Henry D. McDonald, judgment for all costs by defendant in this behalf incurred for which let execution issue.

It is therefore ordered that execution issue against plaintiff and defendant in behalf of the officers of this court for all cost in this behalf incurred. To which judgment plaintiff then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas, and asked 30 days in which to file bills of exceptions & Statements of facts, which request was granted by the Court.

Motion for New Trial.

Filed August 5th, 1910.

In County Court of Lamar County, Texas, July Term, A. D. 1910.

15 HENRY D. MCDONALD
v.
F. A. MABEE.

And now comes plaintiff in above entitled and numbered cause and prays the court to set aside the judgment heretofore rendered herein and grant him a new trial for the following reasons:

1. The court erred in holding that the judgment rendered in the District Court of Lamar County, Texas, on 3rd day of October, A. D. 1893 in favor of H. D. McDonald against D. P. Hollon, F. A. Mabee, et al., was res adjudicata and a merger of the cause of action asserted in the suit and not subject to collateral attack.

Because the record in said suit No. 5468 in the District Court shows that F. A. Mabee was cited therein by publication only upon an affidavit which alleged that he was absent from the State of Texas, and the evidence shows that such affidavit stated true facts. This being the character of service did not authorize the Court to render a personal judgment against F. A. Mabee and the only effect such judgment could and did have was to subject to the judgment property brought under the jurisdiction of the Court in that case.

2. The judgment of the court is in violation of the Constitution Statutes and Laws of the United States and more especially in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States and in effect deprives plaintiff of his property towit: the note and cause of action asserted — him, without due process of law.

MOORE & PARK,
Att'ys for Pl'ff.

Filed August 5th, 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy.

16 *Order on Motion for New Trial.*

In County Court, Lamar County, Texas, July Term, August 5", A. D. 1910.

#2938.

HENRY D. MCDONALD
vs.
F. A. MABEE.

On this day in this cause came on to be heard the motion for a new trial filed herein by attorneys for plaintiff in this cause. And the Court having heard the same and having heard the argument of counsel is of the opinion the law is against the motion. It is therefore ordered, adjudged and decreed by the court that a new trial be not granted as prayed for. To which ruling of the Court plaintiff in open Court then and there excepted and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas.

Request to File Conclusion- of Facts & Law.

Filed 8/6/10.

In County Court, Lamar County, Texas.

H. D. McDONALD
v.
F. A. MABEE.

And now comes plaintiff in above entitled cause and request- the court that he make and file his conclusions of facts and law and file the same as a part of the records in this case.

MOORE & PARK,
Att'ys for Pl't'f.

Filed August 6th, 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy.

17 *Conclusions of Facts and of Law.*

Filed 12th of August, A. D. 1910.

In County Court, Lamar County, Texas, August — A. D. 1910.

No. 2938.

H. D. McDONALD
vs.
F. A. MABEE.

On demand of plaintiff, H. D. McDonald, I find the following as my conclusion of facts and law in the above entitled and numbered cause.

1.

I find that on March 6th, 1891, F. A. Mabee and one D. P. Hollon executed and delivered to plaintiff, H. D. McDonald, the note sued on and fully described in plaintiff's petition, by the terms of which, they promised to pay to H. D. McDonald or order the sum of $300.00 on the 6th day of March, 1892, with interest at the rate of 12 per cent. per annum from date, together with 10 per cent. attorney's fees if collected by law, said note reciting that it was the second and only deferred payment for a certain tract of land in the Henry Stoneham Headright survey in Lamar County, Texas, deeded to them and acknowledging the note to be a vendor's lien on said land.

2.

I find that said note not being paid, that H. D. McDonald, by petition filed in the District Court of Lamar County, Texas, on the 30th day of November, 1892, instituted his suit against F. A. Mabee, D. P. Hollon, M. C. Thompson and Guy Thompson, to recover on said note executed as above found, as against F. A. Mabee and D. P. Hollon and to foreclose his vendor's lien on 260 acres of land situated in Lamar County, Texas, for part of purchase money for which said note was given, as against F. A. Mabee, D. P. Hollon, M. C. Thompson and Guy Thompson, it being alleged that D. P. Hollon had conveyed an undivided one-half interest in said
18 land to said M. C. and Guy L. Thompson. In the petition filed it is alleged that all of the defendants reside in Lamar County, Texas.

—.

I find that Citation on the petition issued out of the District Court of Lamar County, Texas, on the 29th day of December, 1892, directed to the sheriff or any Constable of Lamar County, Texas, commanding him to summon F. A. Mabee, D. P. Hollon, M. C. and Guy L. Thompson to appear at the next term of said Court to be begun and holden on the 3rd day of April, 1893, to answer the petition filed in said suit. On this citation is the following return: "Came to hand on the 29th day of December, 1892, at 10 o'clock A. *D.* and executed within said County of Lamar, on the 30th day of December, 1892, by delivering to the within named D. P. Hollon in person a true copy of this citation, the remaining within named defendants were searched for diligently and learned to be out of the State of Texas." which citation with its return is on file with the papers in the suit of H. D. McDonald against F. A. Mabee, et al., and was introduced as evidence on the trial of this case.

4.

On February 20, 1893, H. D. McDonald, plaintiff, made his affidavit before G. W. Martin, Clerk of the District Court of Lamar County, Texas, in which he stated that the defendants, F. A. Mabee, M. C. Thompson and Guy Thompson are absent from the State of Texas, wherefore, affiant prays that they be cited by publication. This affidavit was filed on the 20th day of February, 1893, and is now on file with the papers in said suit of H. D. McDonald vs. F. A. Mabee, et al., No. 5468, in District Court of Lamar County, Texas, and was read in evidence on the trial of this case.

19 5.

On Feb. 20, 1893, citation issued by the Clerk of the District Court, addressed to the Sheriff or any Constable of Lamar County, Texas, commanding him to summon F. A. Mabee, M. C. Thompson and Guy L. Thompson, by making publication of the citation once each week for four consecutive weeks previous to return day thereof in some newspaper published in Lamar

County, Texas, to appear at the next regular term of the District Court of Lamar County, Texas, to be holden on the 3rd day of April, 1893, then and there to answer the petition of H. D. McDonald filed on the 30th day of November, 1892, in cause No. 5468. This citation as shown by the returns of the officer, came to hand the 20th day of February, 1893, and was executed by publishing the same once each week in the Weekly News, a newspaper published in said Lamar County, for four successive weeks previous to the return day, said publication was made respectively, on the 24th day of Feb., 1893 and the 3rd, 10th and 17th days of March, 1893, a printed copy thereof being attached and made a part of said return. Said citation and the return thereon are on file with the papers in cause No. 5468 of H. D. McDonald vs. F. A. Mabee, et al., in District Court of Lamar County, Texas, and was read in evidence on the trial of this case.

6.

On Tuesday, Oct. 3, 1893 at a regular term of the District Court of Lamar County, Texas, final judgment was entered in favor of H. D. McDonald against D. P. Hollon, F. A. Mabee, M. C. Thompson, and Guy Thompson. The recitation- of said judgment in so far as they may be material will be given herein. Said judgment recites as follows:

Now on this day, this cause was called and it appearing to
20 the Court that at a former term to-wit: the Spring term, 1893, an interlocutory judgment by default was rendered against the defendant, D. P. Hollon, who had been duly cited by personal service, more than ten days before the 1st day of said term and it further appearing to the Court, that the defendants, F. A. Mabee, M. C. Thompson and Guy L. Thompson had been duly and legally cited by publication to appear and answer herein by citation duly issued in pursuance of law and which was duly and legally published in the weekly News, a newspaper published in said County of Lamar, for four successive weeks previous to the return day thereof, said publication therein having been made respectively, on the 24th day of February and the 3rd, 10th and 17th days of March, 1893, and said cause having been continued over to this term by operation of land the court having appointed E. P. Scott, a practicing attorney of this Court, to represent the absent defendants to-wit: F. A. Mabee, M. C. Thompson and Guy L. Thompson, and the said attorney having filed answer for said absent defendants and all parties announcing ready for trial, the matters of law and facts were submitted to the Court, neither party having demanded a jury and it appearing that plaintiff is entitled to recover.

Wherefore, it is ordered, adjudged and decreed by the Court that the plaintiff, Henry D. McDonald, do have and recover of and from the defendants, F. A. Mabee, and D. P. Hollon, the sum of $431.97, being principal, interest and attorney's fees of the note sued on; this sum to bear interest at the rate of 12 per cent. per annum from date, together with all costs for which let execution

issue. And it appearing to the Court that the note sued on is secured by a vendor's line on the following described land herein described the 260 acres of land for which the note was given, and the vendor's lien by the decree is foreclosed on said
21 land and an order of sale awarded.

After awarding an order of sale of the land on which the lien is foreclosed, the judgment further recites: It is further ordered that if the proceeds of the sale of all the foregoing described lands and lots be insufficient to satisfy this judgment, then the officer shall make the remainder or any balance thereof remaining unpaid out of any other property of the defendants, F. A. Mabee and D. P. Hollon, as in case of ordinary executions.

7.

I find that citation to F. A. Mabee and M. C. Thompson and Guy Thompson by publication was based on the affidavit stating that they were absent from the State of Texas, and that the citation published as before found, was the only notice Mabee was given in the suit of H. D. McDonald vs. Mabee, et al., in the District Court and further, that F. A. Mabee did not enter his appearance in said suit, that the judgment rendered therein against him was based solely upon the citation by publication in the Weekly News of date the 24th day of February, 3rd, 10th and 17th days of March, 1893, respectively.

8.

I find that an order of sale was duly issued on said judgment on the 28th day of August, 1894, by virtue of which the land on which the vendor's lien was foreclosed was sold and that the said land was bid in by H. D. McDonald at and for the sum of $100; that after paying cost, there remained $19.45 which was duly credited on said judgment as of date, the 2nd day of October, 1894. That D. P. Hollon is now and had been since the maturity of the notes sued on herein, actually insolvent and the only amount received on the note or judgment by H. D. McDonald is the
22 sum of $19.45, proceeds of the land sold.

9.

I find that F. A. Mabee at the time he joined in the execution of the note sued on, resided in Paris, Lamar County, Texas, and so resided up to the month of April, 1892, when he left Lamar County, Texas, to establish a home at some other place; but I find that Mabee's family continued to reside in Lamar County, Texas, until the spring of 1894, when they left and have since had their home in St. Louis, Mo. I find that F. A. Mabee in the month of April, 1892, left Paris and the State of Texas, and remained away until November, 1892, when he returned to Paris and remained in Paris during the said month of November, when he left again and went to St. Louis, Mo., where he remained from Jan. 1, 1893, to Jan. 1, 1894, though his family still resided in Paris, Texas,

from which place they removed to St. Louis in the Spring of 1894. I find that from Jan. 1, 1893, to Jan. 1, 1894, defendant, F. A. Mabee was absent from the State of Texas but that his family resided in Paris, Texas, during that time and that he claimed Paris, Texas, as his residence, and that since the spring of 1894 he and his family have resided in St. Louis, Mo.

I find that since the defendant Maybee left Paris in April, 1892, he has on different occasions been in the State of Texas at different places but I find that the different times he has been in the State since the 6th day of March, 1892, the date of the maturity of the note sued on, does not total a period of four years up to the time this suit was filed on June 5, 1909.

10.

I find that F. A. Mabee has not been in the State of Texas from March 6, 1892, to June 5, 1909, the date of filing this suit
23 adding together all periods of time he has been in the State, as much as four years.

11.

I find that on June 5th, 1909, plaintiff instituted this suit against F. A. Mabee and at the same time had issued writs of attachment to Nueces County and Duval County; that the writ of attachment issued to Nueces County being levied the 8th day of June, 1909, on the following described land, to-wit:

Situated in Nueces County, Texas, parts of the Enrique Villamed grant and described and known according to the map or plan of the "Bohemian Colony Lands" prepared by A. M. French and dated June, 1905, and now on file in the office of the County Clerk of Nueces County, Texas, as the East or South East Half or farm lot One (1) in Section Four (4) of said "Bohemian Colony Lands," said half being square in shape, 1320 feet in length on every side and containing forty acres and being same lot conveyed to F. A. Mabee by A. A. Cecha and wife Anna Cecha by deed dated Dec. 1, 1906 and recorded in Book 22 pp. 34-36 Nueces County Records.

2nd Tract: Also a tract in same "Bohemian Colony Lands" map or plan above referred to. Lots One (1) and two (2) in Section Five (5) and Lots Five (5) and Six (6), Seven (7) and Eight (8) in Section Four (4) said several lots containing 471½ acres and being the same deed to said F. A. Mabee by A. C. Priday and wife Ines by deed dated Dec. 11, 1906, and recorded in Book 21, pp. 299-301 Nueces County Records; Both the deeds above referred to are specially referred to and adopted as and for a full description of the lots hereby levied on. All of said lots are levied on as the property of the defendant F. A. Mabee. The writ of attachment to Duval County being levied on the 9th day of June, 1909,
24 on the following described lands, to-wit:

First. All that certain piece of land out of large tract of land situated in Duval County, Texas, to-wit:

10-29/54 Ten and twenty nine 54th acres out of Section No. 531 B. S. & F. original grantees and patented to Juan Lopez Saenz said Ten and twenty nine fifty fourths acres being the same acquired by Antonio Serna de Lopez by deed dated April 25, 1905, and being part of same land set apart by decree of *of* the District Court in a deed of Partition of date, Oct. 1902, said land being undivided out of said portion set aside to Cecilla S. de Serna by said decree for a better description of said land hereby conveyed, reference is hereby made to the Archives of Duval County, Texas, and being same land described in a deed from Antonio S. de Lopez and Thomas Lopez to F. A. Mabee, recorded in Book "No. 1," pages 306-307, Duval C. Records.

Second. A tract of land lying in said County of Duval and being 7-29/54 acres out of section No. 531 B. S. & F. Patented to Juan Lopez Saenz and being a part of 16-29/54 acres out of said Section and also being out of a part of 63-11/18 acres set apart to Cecilia S. de Serna in cause No. 1411 of the Docket of the Dist. Court of Duval County, Texas, and Styled Cecilia S. de Serna et al. vs. S. J. Lancaster, entered at the March term, 1903, of said Court and being a part of a 49 and a fraction acres transferred by Cecilia S. de Serna to Eliseo Serna et al. by deed duly recorded in Book "U" pages 6 to 8, Duval County Records and being the same land conveyed to F. A. Mabee by Eliseo Serna by deed recorded in Book "No. 1," pages 330-332, Duval Co. Records.

Third. A tract of land in said Duval County, Texas, being an undivided interest of 16-29/54 acres out of 49-4/8 acres, same being
but of that certain larger survey No. 531, made for B. S. &
25 F. and patented to Juan Lopez Saenz and acquired by Maria Jesua Serna from Cecilia Saenz de Serna by deed dated April 25, 1905, and recorded in Duval County, Texas, and being a part of the same land set apart by decree of the Dist. Court to Cecilia Saenz de Serna in the cause styled Cecilia S. de Serna vs. S. J. Lancaster, et al. and entered at the November Term, 1902, of Duval County Dist. Court and being the same land conveyed to F. A. Mabee by Maria Jesusa Serna by Deed recorded in Book No. 1, page 362/364 Duval Co. Records.

12.

I find that plaintiff has contracted to pay his attorneys Moore & Park ten per cent. as attorneys' fees on the amount recovered in this case and that the same is reasonable.

Conclusions of Law.

From the foregoing findings of fact, I conclude as a matter of law:

1st. That the plea of limitation interposed by defendant should be over-ruled and I conclude that plaintiff is not barred of recovery by the statutes of limitation.

2nd. I conclude that the judgment rendered by the District

Court of Lamar County, Texas, on the 3rd day of October, A. D. 1893 in the case of H. D. McDonald vs. F. A. Mabee, et al., No. 5468, by which judgment, H. D. McDonald recovered judgment against D. P. Hollon and F. A. Mabee, on the note therein sued on and being the same note on which this suit is based, was a valid judgment in personam against F. A. Mabee, and would have supported an execution in favor of plaintiff therein, against the property of F. A. Mabee generally, and therefore merged the note into a judgment. And so concluding, render judgment for defendant.

26 L. L. HARDISON,
County Judge, Lamar County, Texas.

Filed August 12th, 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy.

Appeal Bond.

In the County Court of Lamar County, Texas.

No. 2938.

HENRY D. McDONALD
vs.
F. A. MABEE.

Whereas, in the above styled and numbered cause pending in the County Court of Lamar County, Texas, and at a regular term thereof to-wit, on the 3rd day of August, 1910, judgment was rendered that plaintiff take nothing by reason of his said suit against defendant and that the defendant recover of and from plaintiff, all costs in this behalf expended.

Whereas, on the 6th day of August, 1910, a motion heretofore filed by the said Henry D. McDonald, praying for a new trial, was overruled, to which action of the Court, the said Henry D. McDonald then and there excepted and gave notice of appeal to the Court of Civil Appeals of the 6th Supreme Judicial District at Texarkana, in the County of Bowie.

Now, therefore, we, Henry D. McDonald as principal, and N. H. Ragland and J. F. McReynolds as surety, acknowledge ourselves bound to pay F. A. Mabee, the sum of $100.00, conditioned that the said Henry D. McDonald, appellant, shall prosecute his appeal with effect and shall pay all costs which have accrued in the Court below and which may accrue in the Court of Civil Appeals and the Supreme Court.

27 Witness our hands this 19th day of August, 1910.

HENRY D. McDONALD.
N. H. RAGLAND.
J. F. McREYNOLDS.

I fix the probable amount of costs of this suit in the Court of Civil Appeals and the Supreme Court and the Court below at $50.00, and approve the foregoing bond, this the 20th day of August, 1910.

SAM C. JOHNSTON,
Clerk County Court, Lamar County, Texas,
By T. L. BEAUCHAMP, *Deputy.*

Filed August 20, 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy.

Assignment of Errors.

Filed October 1st, 1910.

No. 2938.

HENRY D. MCDONALD
v.
F. A. MABEE.

Suit Tried in the County Court of Lamar County, Texas.

And now comes appellant, Henry D. McDonald, and presents the following assignments of error upon which he relied for a reversal of the judgment rendered in the County Court:

First Assignment of Error.

The trial court having found that F. A. Mabee, in the suit brought in the District Court of Lamar County, Texas, No. 5468, entitled Henry D. McDonald vs. F. A. Mabee, was cited by publication, based upon an affidavit alleging that F. A. Mabee was absent from the State of Texas and that said citation by publication was the only notice Mabee was given in said suit, that he did not
28 enter his appearance therein, and that the judgment rendered therein against him was based solely upon citation upon publication in the Weekly News of date the 24th of February, the 3rd, 10th and 17th days of March, 1893, and that at the time of the publication of said notice, F. A. Mabee was actually absent from the State of Texas, erred in holding that the judgment rendered in said cause, No. 5468, in the District Court of Lamar County, Texas, was a valid judgment in personam, against F. A. Mabee, and would support an execution in favor of plaintiff against the property of F. A. Mabee, generally, and therefore, merged the note sued on in this case into judgment and erred in rendering judgment for the defendant. From the conclusions of fact, the Court should have held the judgment rendered in the District Court, No. 5468, void in so far as it purported to be a personal judgment against F. A. Mabee and should have rendered judgment in favor of plaintiff for the balance on the note sued on in this case, for attorney's fees and for costs of suit.

Second Assignment of Error.

From the facts found by the court, judgment should have been rendered in favor of plaintiff for the amount due on the note herein sued on, and the Court erred in concluding as a matter of law, that plaintiff should not recover but that judgment should be in favor of defendant.

Third Assignment of Error.

The Court erred in concluding as a matter of law, that plaintiff could not recover and in rendering judgment for defendant because the facts as found by the Court show that the judgment rendered in favor of plaintiff against F. A. Mabee in the District Court of Lamar County, Texas, No. 5468, was void in so far as it purported to be a judgment in personam against F. A. Mabee.

29 Fourth Assignment of Error.

The judgment of the Court is in direct violation of the Constitution, Statutes and laws of the United States, more especially in violation *in violation* of Section 1 of the 14th Amendment of the Constitution of the United States, and in effect, deprives plaintiff of his property, to-wit; the note and cause of action asserted by him without due process of law, in that the Court held that the judgment rendered by the District Court of Lamar County in cause No. 5468 was a valid personal judgment against F. A. Mabee, when the facts as found by the Court show that said judgment was rendered on citation by publication, which publication was based upon an affidavit alleging that F. A. Mabee was absent from the State of Texas and that said F. A. Mabee, at the time of the notice, was actually absent from the state and had no further notice of the pendency of said suit except said publication.

Fifth Assignment of Error.

The trial court erred in over-ruling the appellant's motion for a new trial, based on the grounds that the character of service had on F. A. Mabee in cause No. 5468 in the District Court of Lamar County, did not authorize and would not support a judgment against F. A. Mabee in personam; and because to give such judgment such effect in this cause would be depriving plaintiff of his cause of action without due process of law and would be contrary to the Statutes and laws of the United States as Construed by the Supreme Court of the United States and contrary to Section 1 of the 14" Amendment of the Constitution of the United States.

30 MOORE & PARK,
Attorneys for Appellant H. D. McDonald.

Filed October 1st, 1910. Sam C. Johnston, Clerk, County Court, Lamar County, Texas. By T. L. Beauchamp, Deputy.

Certificate of Clerk.

THE STATE OF TEXAS,
County of Lamar:

I, Sam C. Johnston, Clerk of the County Court in and for Lamar County, do hereby certify that the foregoing twenty-five pages constitute a full transcript of the records in the case of Henry D. McDonald vs. F. A. Mabee, No. 2983, and that the same is a true and correct copy of said records.

To certify which I hereunto set my hand and affix the seal of the Court at my office in Paris, Texas, this 8th day of October, A. D., 1910.

SAM C. JOHNSTON,
Clerk County Court, Lamar County, Texas,
By T. L. BEAUCHAMP, *Deputy.*

31 THE STATE OF TEXAS:

No. 2983.

HENRY D. McDONALD
vs.
F. A. MABEE.

Judgment rendered August 3, 1910, for — Dollars, in favor of defendant.

Mr. Henry D. McDonald to Officers of Court, Dr.

Clerk's Fees.

	Dol.	Cts.
Docketing cause, 10 cts		.10
Filing, 5 cts		.05
Appearance, 5 cts. (2)		.10
Citation and (2) Copies		1.00
1 Copy of Petition, with certif		1.00
Filing papers, 8		.40
Continuance		....
Issuing — Subpoena (— Names)		....
Swearing — witnesses		....
Approving bond		....
Swearing and Emp. Jury		....
Rec'd Verdict		....
Assessing Damages		....
Entering Judgment		.50
Entering 1 order		.25
Taxing cost 25 cts		.25
Issuing execution or order of sale		....
Issuing Attachment		....

Issuing Writ of Possession	....
Issuing Sequestration	....
Issuing Garnishment	....
Issuing Writ of error	....
Entering Return, Execution	....
Aff. & Bonf for attach	1.00
Issuing Writ of Attach	.50
Alias Cit. & Copy Petition	1.50
" " " " "	1.50
" " " " "	.50
Transcript	12.50
Total Clerk's Cost	21.15

Sheriff's Fees.

	Dol. Cts.
Executing Writ	....
Summoning — Witnesses	....
Executing Attachment	....
Executing Sequestration	....
Executing Writ of Possession	....
Jury Fees	....
Levying Execution	....
Return Ex. Execution	....
Total Sheriff's Fees	....
Clerk's Fees	21.15
Judge's fee	3.00
Jury fee	....
Witness attendance	....
Depositions	10.00
Out Officer's Cost	6.00
Total Cost	40.15
Judgment	....
Total, Cost and Judgment	40.15

THE STATE OF TEXAS,
County of Lamar:

I hereby certify the above to be a correct account of the cost in the above entitled and numbered suit, up to date. Witness my hand and the seal of said Court, this 8th day of October, 1910.

[SEAL.] SAM C. JOHNSTON,
Clerk County Court, Lamar County, Texas,
By T. L. BEAUCHAMP,
Deputy.

32 (Endorsed:) # 732. Henry D. McDonald, Appellant, vs. F. A. Mabee, Appellee. From the County Court of Lamar County. Applied for by Moore & Park, Attorneys for Ptff. on the 6th day of September, 1910, and delivered to Moore & Park on the

8th day of October, 1910. Sam C. Johnston, Clerk County Court, Lamar County, Texas, by T. L. Beauchamp, Deputy. Filed in Court of Civil Appeals, at Texarkana, Texas, the 18th day of October, 1910. E. T. Rosborough, Clerk, Court of Civil Appeals Sixth Supreme Judicial District of Texas. By L. A. Graham, Deputy. Moore & Park attorneys for appellant, Paris, Texas, P. O. Address. Lightfoot, Long & Wortham, attorneys for appellee, P. O. Address, Paris, Texas. No. 2299. Filed in Supreme Court June 9, 1911. F. T. Connerly, Clerk, by J. S. Myrick, Deputy.

33 PROCEEDINGS IN THE COURT OF CIVIL APPEALS FOR THE SIXTH DISTRICT, TEXARKANA, TEXAS.

Opinion.

(Majority.)

In the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

No. 732.

HENRY D. MCDONALD, Appellant,

v.

F. A. MABEE, Appellee.

Appeal from the County Court of Lamar County.

Appellant by his petition filed on the 5th of June, 1909, sought a recovery against appellee on a promissory note alleged to have been executed by appellee and one D. P. Hollon on March 6, 1891, for the sum of $300, with interest and attorney's fees if collected by law. Hollon was alleged to be wholly insolvent, and was not made a party to the suit. Appellant sued out an attachment and had the same levied on certain real estate as the property of appellee. Appellee appeared and by his answer plead, as material to this appeal, that on October 3, 1893, the appellant obtained judgment against him and Hollon in Cause No. 5468 in the District Court of Lamar County, Texas, on the note sued on, and with foreclosure of a vendor's lien on certain land for the purchase of which said note was given, and that said judgment was not appealed from and was final and by reason of which the cause of action asserted by appellant became merged into the judg-
34 ment and was a complete bar to appellant's suit. Appellant, replying to that part of the answer setting up a former judgment, alleged that at the time of the institution of the suit in the district court appellee was a non-resident of the State of Texas; that, erroneously supposing him to be a resident of Lamar County, Texas, he caused citation to issue to said county, which was not served on appellee, but the return of the officer showed him to be

absent from the State of Texas, whereupon appellant made an affidavit in said cause that the appellee was absent from the State of Texas, and praying that he be cited by publication, which citation was issued and published as required by law; and that the judgment rendered in said cause against appellee was based on citation by publication, and so recites on its face; wherefore the judgment rendered thereon was not a valid judgment against appellee, except so far as it foreclosed the vendor's lien on the land within the jurisdiction of the court, and would not support an execution against the property of appellee generally.

The case was tried before the court without a jury, and the court found as a fact that appellee, in Cause No. 5468 in the District Court of Lamar County, Texas, was cited by publication issued on application and affidavit stating that he was absent from the state, and that appellee was given no other notice of the suit and did not enter his appearance therein, and that the judgment against appellee was, as disclosed on its face, based solely upon the citation by publication. The court further found: "I find that F. A. Mabee at the time he joined in the execution of the note sued on, resided in Paris, Lamar County, Texas, and so resided up to the month of April, 1892, when he left Lamar County, Texas, to establish a home at some other place; but I find that Mabee's family continued to reside in Lamar County, Texas, until
35 the spring of 1894, when they left, and have since had their home in St. Louis, Mo. I find that F. A. Mabee in the month of April, 1892, left Paris and the state of Texas, and remained away until November, 1892, when he returned to Paris and remained in Paris during the said month of November, when he left again*st* and went to St. Louis, Mo., where he remained from Jan. 1, 1893, to Jan. 1, 1894, though his family still resided in Paris, Texas, from which place they removed to St. Louis in the spring of 1894. I find that from Jan. 1, 1893, to Jan. 1, 1894, defendant F. A. Mabee was absent from the state of Texas, but that his family resided in Paris, Texas, during that time and that he claimed Paris, Texas, as his residence; and that since the spring of 1894, he and his family have resided in St. Louis, Mo."

After Stating the Case.

Under proper assignment the appellee challenges the ruling of the court, and contends that the judgment in issue, as far as it operated in personam, was under the facts void for the want of jurisdiction in the court to render such character of judgment. The question presented is to be considered under the conclusive facts that the defendant in the said judgment, though a citizen of Texas and claiming Texas as his residence, was at the time of the suit and publication of the citation and rendition of judgment absent from the State of Texas and in St. Louis, Missouri. He was in St. Louis, Missouri, from December 1892 to January 1, 1894. The purpose of his leaving and absence from the State of Texas at the time was, as found by the court, "to establish a home in some other

place," and he and his family in the spring of 1894 did remove to St. Louis, Missouri, and have since resided there. It was shown that the suit in question was filed on November 30, 1892, to
36 recover the amount of the note and to foreclose a lien on real estate in this state. Personal citation was issued to appellee on December 29, 1892, returnable to the April term of court, 1893. This citation was returned by the sheriff on December 30, 1892, not executed as to appellee, and with the endorsement "Learned to be out of the State of Texas." Citation by publication, under the statute of this state, then issued on February 20, 1893, and was duly published four weeks, ending March 1893. Judgment was finally rendered on October 3, 1893, against appellee personally for the amount of the note and execution awarded generally, as well as for foreclosure of the lien and sale of the land. The judgment on its face recited that it was rendered upon citation by publication based on the defendant's being absent from the State of Texas. The defendant in the suit had no notice of the suit, and did not appear.

To make the appeal clear, it is admitted by appellant that the former judgment of the district court in issue was valid to the extent that it foreclosed a lien on the property, as a proceeding in rem. It is contended by him that it is invalid as far as it was made a personal judgment, as it was, against appellee for any balance of the original obligation remaining unpaid after exhausting the property on which the foreclosure was had. Appellee at the time of the instant suit was a citizen and resident of Missouri, but appeared and answered and defended the suit. Therefore, without question, appellant had the right to sue and have judgment rendered in his favor in the instant suit for the balance due on the original note, interest, attorney's fees, and costs of court, with foreclosure of his attachment lien, if the former judgment in personam was a nullity for want of jurisdiction. If the former judgment was a valid judgment in personam, then it operated as a merger of the original cause of action and was a bar to the original suit. The
37 trial court concluded as a matter of law that it was a valid judgment in personam. The facts positively appearing, as they do, upon the record, any presumption of fact that would be required to be indulged in a collateral attack upon a judgment here ceases, and the question presented becomes one of law. The celebrated case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, has been uniformly regarded as placing beyond question the doctrine that a personal judgment against a non-resident who was not served within the state and who did not appear or assent to the mode of constructive service is invalid even in the state where rendered. In deference to the decision the later decisions in this state have so followed the doctrine, and thus overturned earlier decisions of the State. Stuart v. Anderson, 70 T. 588, 8 S. W. 295; York v. State, 73 T. 651, 11 S. W. 869; Hardy v. Beattie, 84 T. 562, 19 S. W. 778; Maddox v. Craig, 80 T. 600, 16 S. W. 328; Ry. Co. v. Gay, 86 T. 586, 26 S. W. 603. In that case the United States Supreme

Court held that the established principle of law there discussed forbids personal judgments against a non-resident upon constructive service only, and that such principle is so far fundamental that a judgment rendered in violation thereof, though authorized by a state statute, violates the requirement of the constitution as to due process of law. The fundamental principle so declared and applied in the case was, as stated in the opinion at the outset, "the authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as a mere abuse." The court stated the rules to be: (1) "that every state possesses exclusive jurisdiction
38 and sovereignty over persons and property within its territory," and (2) "the other principle of law referred to follows from the one mentioned: that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory." And the court remarked, "These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases;" and then quotes for illustration from a decision of Mr. Justice Story. As the leading authority for this principle this case has been numerously applied by the citing cases. Sustaining and declaring the same principle are: Freeman v. Alderson, 119 U. S. 165, 30 L. Ed. 372; Wilson v. Seligman, 144 U. S. 41, 36 L. Ed. 338; Ellenwood v. Chair Co., 158 U. S. 105, 39 L. Ed. 913; Duel v. Blackman, 169 U. S. 243, 42 L. Ed. 733. See also Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Ableman v. Booth, 21 Howard, 506, 16 L. Ed. 169. Is the principle of the Pennoyer case applicable and ruling — the instant case? Neff, the party defendant in the judgment, it is true, was a non-resident of Oregon and a citizen and resident of California, and in that particular fact the instant case differs. But the two cases are identical in the fact of the absence of the defendant from the state at the time of publication. And it was to the fact of being beyond the reach of the process, and not to the status of citizenship, a majority of this court think that the court in that case was applying as governing the principle that a court has no power to extend its process beyond the limits of the state, and the laws of one state have no operation outside of its own territory. The court was determining whether or not there had been in fact any legal service upon the defendant, as essential to the jurisdiction of the court over the person of the defendant and the validity of the judgment. It is a cardinal
39 principle that an opportunity be given for a day in court to the defendant by legal service. It is the fact appearing of service that gives the court jurisdiction in personal judgments. So if it be conceded, as it must, that constructive notice has no extra-territorial force, and such notice only is, as here, relied on to sustain a personal judgment against a defendant who was not in fact within the state, then it would affirmatively appear in the record

in legal effect a want of any service upon the defendant. To say otherwise would be to reverse the rule of law and state that the published notice had legal force outside the limits of the state, and to charge the defendant with notice. In such event the defendant out of the state would be held to know the fact of notice in the face of the law declaring such notice ineffectual and void and not existent or potent as a legal fact. It would be an inconsistent rule that makes valid the same act and procedure that is deemed at the same time ineffectual and void and without the power of the court. And to predicate the test of jurisdiction of the court here to render personal judgment on constructive notice only, upon the fact of being beyond the territorial limits and bounds of the court's process, rather than the mere fact of being in the relation of citizen towards the state where the court's process issues, makes the principle involved, we think, reasonable. To grant jurisdiction because of the bare fact of being in the relation of citizen to the particular state predicates the authority of the court to enter the personal judgment on such notice upon the ground either that citizenship as a political status makes, as a conclusive matter of law, the particular citizen constructively present within the territorial limits of the court's process, though in fact absent, or it gives extraterritorial force to the court's process when he is absent from the state.

It would be fallacious reasoning, it is believed, to so argue that upon the ground the defendant has had his day in court by due process of law. The Supreme Court of this state, in Ry. Co. v. Gay, supra, at p. 603, 26 S. W., in speaking to the principle that no judicial process can have lawful authority outside of the jurisdiction of the court issued, says: "Whether want of jurisdiction arises from the fact that the thing to be affected by judgment and process of a court is without its territorial jurisdiction or without its jurisdiction for any other reason is unimportant, for in either case the process is invalid because the court has not jurisdiction." The following cases apply the rule as to citizens who are absent from the state: De La Montaya v. De La Montaya, 112 Cal. 101, 44 Pac. 345; Smith v. Grady, 31 N. W. 477. In Bickerdike v. Allen, 41 N. E. 740, it was held that mere publication would not as against a citizen gone out of the state be sufficient, but that the publication supplemented by mailing to him a notice was sufficient. There is involved, we think, a federal question.

Under the facts of this case, and in conformity with the principle of law discussed, a majority of this court are of the opinion that the trial court erred in holding that the judgment in issue was a valid personal judgment; and it is ordered that the judgment of the court be reversed and here rendered for appellant, with costs of appeal against the appellee.

LEVY,
Associate Justice.

March 9, 1911.

Hodges, J., dissents.

(Endorsed:) No. 732. Henry D. McDonald vs. F. A. Mabee. Opinion of the Court. Filed Mar. 11, 1911. E. T. Rosborough, Clerk Court of Civil Appeals 6th Supreme Judicial Dist. of Tex. By L. A. Graham, Deputy. Recorded in Book 3, page 1107. Filed in Supreme Court May 8, 1911. F. T. Connerly, Clerk.)

41 *Opinion.*

(Dissenting.)

In the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

No. 732.

HENRY D. MCDONALD, Appellant,
v.
F. A. MABEE, Appellee.

Appeal from the County Court of Lamar County.

I am not prepared to concur in the views expressed or the disposition made of this case by my associates; and for the purpose of making my position understood, I shall restate the case in part. As stated by Justice Levy, the suit is one instituted in the County Court of Lamar County by H. D. McDonald against F. A. Mabee to recover a sum of money alleged to be due on a promissory note executed by Mabee and others in 1891. It is alleged that Mabee is a non-resident, but is temporarily within the State of Texas. Among other defenses interposed by the defendant, Mabee, he pleaded in bar a former judgment recovered in October, 1893, by the plaintiff, McDonald, against him and other parties, in the District Court of Lamar County, Texas, in cause No. 5468, for the sum of $431.97; that said judgment was rendered in a suit on the same note upon which this suit is based; and claims that the debt evidenced by that note was merged in that judgment, and for that reason that this suit should not be maintained. By supplemental petition the plaintiff, appellant here, replied setting up substantially the following facts: "That at the time the aforesaid
42 suit was instituted the defendant Mabee was actually a non-resident of the State of Texas, but, erroneously supposing him then to be a resident of this state, the plaintiff alleged that fact in his original petition in that suit, and citation was issued in pursuance of such allegation, to Lamar County, Texas. That upon the sheriff's return being made showing the defendant to be out of the State of Texas, plaintiff filed an affidavit in said cause to the effect that defendant was absent from the State of Texas, and praying for citation by publication. Citation was thereupon issued and published according to law, and thereafter on the 3rd day of October, 1893, judgment was rendered in plaintiff's favor against

all of the defendants; that is to say against the defendants Mabee and Hollon, for the amount of the note sued on, including interest and attorney's fees, amounting to the sum of $431.97.—That the record in said cause shows that said defendants Mabee and M. C. and Guy L. Thompson had been cited by publication only; and the judgment therein, which defendant now pleads as a merger and res adjudicata, shows on its face that fact, and that it was rendered upon such service and upon that only." The supplemental petition further alleges that the land upon which it was sought to foreclose a vendor's lien in the same proceeding was sold in compliance with an order of the court, and that a credit for the sum of $19.45 resulting from that sale was entered upon that note. It is unnecessary to further notice the pleadings.

It seems to be conceded in the briefs of both parties that the only question which this court is called upon to decide is, whether the judgment rendered in favor of the appellant McDonald against Mabee and others in cause No. 5468 in the District Court of Lamar County, Texas, in 1893, was a valid personal judgment against Mabee.

43 This being an action instituted in the county court, any issue questioning the validity of a judgment rendered in the district court necessarily presents a collateral, and not a direct, impeachment. In a collateral attack the validity of a domestic judgment must be determined by the record itself, and not by evidence aliunde. Martin v. Byrne, 80 T. 679, 16 S. W. 1072; Murchison v. White, 54 T. 82; Treadaway v. Eastburn, 57 T. 213; Holt v. Love, 131 S. W. 857; Hardy v. Beatty, 84 T. 562, 19 S. W. 778; Horst v. Lightfoot, 132 S. W. 761. Hence it follows that the findings of the trial court with reference to Mabee's residence at the time of the original suit and the publication of citation, are wholly immaterial and add nothing by way of supporting the judgment from which this appeal is prosecuted. The situation presented is somewhat peculiar. The attack upon the validity of that judgment is made by the plaintiff, the one who presumably would insist upon its validity, while its validity is asserted by the defendant, the party who would ordinarily be expected to make the assault. That peculiarity, however, will not be considered as affecting the question before the court. There is no statement of facts in this record, and in order to ascertain the contents of the judgment recovered in the former suit we must have recourse to the findings of the trial court. From these I gather the following facts: That H. D. McDonald filed his petition in the District Court of Lamar County on the 30th of November, 1892, against F. A. Mabee and others not necessary to name, seeking to recover a judgment on the note now forming the basis of this suit, and to foreclose a vendor's lien on a tract of 260 acres of land situated in Lamar County. The petition alleged that all of the defendants resided in Lamar County, Texas. Citation was issued upon that petition, on the 29th

44 of December, 1892, in form required by law, directed to the sheriff of Lamar County, Texas. The sheriff returned the citation with the following endorsement: Came to hand on the 29th

day of December, 1892, at 10 o'clock a. m., and executed within said County of Lamar on the 30th day of December, 1892, by delivering to the within named defendant D. P. Hollon in person a true copy of this citation. The remaining within named defendants were searched for diligently, and learned to be out of the State of Texas." On February 20, 1893, plaintiff McDonald made his affidavit before the district clerk, in which he stated that the defendants Mabee, and M. C. and Guy L. Thompson, the other defendants, were absent from the State of Texas, and prayed that they be cited by publication. The affidavit was filed on the same day, and is now among the papers in that case on file in the district clerk's office. Citation was issued accordingly, and published for the time required by law previous to the return day, in a newspaper published in Lamar County. On the 3rd day of October, at a regular term of the district court, the final judgment was entered in favor of H. D. McDonald against F. A. Mabee, M. C. Thompson and Guy Thompson. The recitation in the judgment, so far as material, is as follows: "Now on this day the cause was called; and it appearing to the court that at a former term, to-wit, the spring term, 1893, an interlocutory judgment by default was rendered against the defendant D. P. Hollon, who had been duly cited by personal service more than ten days before the first day of said term, and it further appearing to the court that the defendants F. A. Mabee, M. C. Thompson, and Guy L. Thompson had been duly and legally cited by publication to appear and answer herein by citation duly issued in pursuance of law, and which was duly and legally published in the Weekly News, a newspaper published in said County of Lamar, for four successive weeks previous to the return day thereof," etc., reciting there after the appointment of an attorney to represent the absent defendants, and rendering a personal judgment in proper form against all of them for the amount sued for, and a foreclosure of the vendor's lien on the land described in the petition.

45

When the entire record is considered it appears that Mabee, the only party to that suit, with which we now have any concern, was a resident of Texas, but was at the time absent from the state; that he was cited by publication only, and never entered his appearance in the case. If these disclosures are to be taken as affirmatively showing the rendition of a personal judgment without proper process, it must be because Mabee was cited only by publication while absent from the state. The question, then, is, does the mere absence from the state, even though temporary, of a citizen domiciled in Texas, place him beyond the reach of the processes of our courts so as to render them powerless to determine any issue involving his personal liability The majority of the court have answered that question in the affirmative. I am frank to concede that the position which they have taken is not without support, both in reason and authority, and the argument upon which it is grounded has much force to comment it. The high regard which I entertain for the legal ability of my associates makes me loath to record any dissent from their views on any question which has received their

thoughtful consideration. Difference with them is alone sufficient to cause me to doubt the correctness of my own conclusions until I have satisfied myself by as careful an investigation as I may be able to give the subject. Such sentiments and misgivings furnish the only excuse I have to offer for the length to which I have extended this discussion.

The doctrine announced in Pennoyer v. Neff, cited in the opinion of the majority, and which has been followed throughout
46 the country, is relied upon as controlling the disposition made of this case. The facts of that case show that the judgment there attacked was rendered by a state court in Oregon against Neff, the defendant in the suit, upon service of citation by publication; that Neff was at the time he was sued, and notice published, domiciled and residing in the state of California; and that he never entered his appearance in the proceeding. Upon that state of facts Justice Field announced the rule that "where the entire object of the action is to determine the personal rights and obligations of the defendants, that is where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run in another state, and summon parties there domiciled to leave its territory and respond to proceedings against them." As stated by the court in that opinion, that was no new doctrine, but had been recognized in that and other courts in many previous adjudications. So far as I have been able to ascertain, neither before nor since the case of Pennoyer v. Neff was decided has the Supreme Court of the United States enlarged the rule there laid down so as to include a state of facts like that presented in this appeal. It is only by the application of a rule of construction to the reasons assigned for the holding there announced that that case can be regarded as direct authority for the conclusion reached by the majority in this case. The statement that the processes issued from state courts can have no extraterritorial effects, when standing alone and without qualification strongly supports the contention of counsel for appellant. If the use of this language immediately following, *"and summon parties there domiciled to leave its territory and respond to proceed-*
ings against them," (italics mine), does not limit the rule
47 previously announced, then I see no escape from the conclusion reached by the majority and insisted upon by the appellant, unless that decision is to be ignored as an authority. In that case, and others where the same question is considered, the limitation placed upon the power of state tribunals is predicated upon the lack of jurisdiction in the court over the person of the non-resident where constructive service alone is relied on. It occurs to me that in its final analysis the question is more properly one which involves the power of a state, rather than the jurisdiction of the state court. If the state can constitutionally confer judicial authority upon its courts, then in this instance the court did not exceed its power. Art. 1235, Revised Statutes. It is not contended that there was any irregularity in the original proceedings in observing the statutory requirements.

That the Supreme Court of the United States does not mean to hold that a personal judgment can not, under any circumstances, be rendered against an absent defendant upon constructive service, is made clear by reference to other decisions rendered by it. In Knowles v. Logansport G. & C. Co., 19 Wallace, 59, that court, after deciding that a judgment rendered upon constructive service against a non-resident would not support a personal judgment against the defendant, said: "We do not mean to say that personal service is in all cases necessary to enable the court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state; but in the case of non-residents like that under consideration personal service cannot be dispensed with unless the defendant voluntarily appears." Therefore, in deference to the judgment of the court upon the issue of jurisdiction, if there
48 were any circumstances, not inconsistent with the facts disclosed by the record, under which the District Court of Lamar County could have rendered a personal judgment against Mabee during his absence from the state, we must assume that those conditions were found to exist and formed the basis of the adjudication made,

That a court of this state may render a personal judgment against a resident defendant domiciled here during his absence from the state, upon constructive service, is, I think, well settled by the decisions of this state. In Northcraft v. Oliver, 74 T. 162, 11 S. W. 121, the judgment was attached upon the ground that A. T. Oliver, the party against whom it was rendered, was absent from the state, having his residence in Brazil at the time he was sued. The record shows that he was cited by publication, but that he never appeared, and a judgment was rendered against him by default. In disposing of this feature of the case Justice Henry, who rendered the opinion of the court, said: "The property of the deceased (Oliver) was in this case charged with the payment of his debts. This charge was superior to the claims of his heirs. The facts show that he had abandoned his residence in this state and was permanently domiciled elsewhere when he died. That removes from this case all questions of homestead and allowance, which usually will arise in such cases. * * * The evidence, is, we think, sufficient to support the court's finding that T. A. Oliver was at the date of the rendition of the judgment against him a non-resident of the State of Texas. Appellants claim that the rule that jurisdiction over the person cannot be acquired merely by service by publication does not apply to citizens of Texas, but is limited to non-residents. The rule that service by publication only does not confer jurisdiction in our courts is adopted by us in deference to the authority
49 of the case of Pennoyer v. Neff, and we are not disposed to extend it beyond the doctrine announced in that case. "We understand that authority holding that such service does not confer jurisdiction over a non-resident of the state does not extend any further; and we hold, as heretofore, that such service upon our

own resident citizens made in pursuance of our statute is binding." In Fernandez v. Casey, 77 T. 452, 14 S. W. 149, a judgment had been rendered in the district court against Fernandez & Ackerman on service by publication after both of them had left the state. Neither of them was ever served with any other process, and neither entered his appearance in the suit. The record shows that Ackerman left the state for the purpose of taking up his residence elsewhere, and did so; but that Fernandez only traveled around through another state for about six months, and then returned to Texas. A personal judgment was rendered against Fernandez upon that service; thereafter an execution was issued and levied upon real estate belonging to him, and he sought by an application for writ of injunction to restrain the sale upon the ground that the judgment was invalid because at the time of its rendition he was absent from the state and had never been personally served nor had he entered his appearance in the suit. Justice Henry, again rendering the opinion of the court, said: "The facts, we think, clearly show that Fernandez was a resident citizen of the State of Texas; and that though he was temporarily absent from the state, he had never acquired a domicile elsewhere. Under these circumstances we think the service by publication of process against him according to the provisions of our statutes conferred upon the justice court the jurisdiction that it exercised in rendering judgment against him." Horst v. Lightfoot, 132 S. W. 761, is a very recent decision by our
50 Supreme Court, in which the case of Northcraft, v. Oliver, supra, is cited with apparent approval. This was an action of trespass to try title, and the defendant in the suit claimed under an execution sale by virtue of a judgment recovered by Meuly against Valentine Schneider. The judgment upon which the execution was issued recited that the defendant failed to appear, but was silent as to service on him. The original petition in the case claimed only an indebtedness from the defendant to the plaintiff, and alleged that the defendant was absent from the state, so that ordinary process of law could not be served on him, and prayed for service by publication. The affidavit for service by publication was as follows: "The facts set forth in the foregoing petition are correct and true, and further the said Schneider is not a resident of the state." The citation issued and published recited that Schneider was a non-resident. The court held that the record disclosed upon its face that the personal judgment rendered against Schneider was void. Justice Williams, in delivering the opinion, said: "But we must sustain the contention that the judgment was void, because the record in that case shows that the court never acquired jurisdiction over the person of Schneider. The judgment itself being silent as to jurisdictional facts, other parts of the record supplying them may be consulted; and they show that Schneider was a nonresident of the state and therefore not to be brought within the jurisdiction of the court by any process it could issue. Treadaway v. Eastburn, 57 T. 209. *The allegation of the petition that the defendant was absent from the state, by itself would not be inconsistent with the existence of power in the court to reach him with*

its writ, since one may be absent from the state and yet be a citizen and resident in it, and therefore amenable to the process of its courts. (Italics mine.) But his absence may be because of non-residence,
and this is what the petition and the affidavit for publica-
51 tion considered together show to have been true of Schneider;
and it follows that jurisdiction over his person could not be obtained by constructive service," citing Northcraft v. Oliver, supra. The views expressed by our Supreme Court in the above cases are sustained by the following authorities outside of the state; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A., 782, 41 N. E. 740; Re Denick, 92 Hun. 161, 36 N. Y. Sup. 518; De La Montaya v. De La Montaya, 112 Calif. 101, 32 L. R. A. 82 (dissenting opinion): Freeman on Judg., sec. 570; 2 Black on Judg., sec. 907; 1 Wharton on Conflict of Law, sec. 237*b*. Mr. Freeman, in the section above referred to, after considering at some length the authorities upon this question, says: "The position, however, which seems to be best sustained both by reason and precedent, is, that a state has the authority to provide the means by which its own citizens may be brought before its courts, that the courts of other states have no authority to disregard the means thus provided, and finally that every judgment or decree obtained in a state against one of its citizens by virtue of a lawful, though constructive, service of process, should be as obligatory upon such citizen in every other state as it is in the state when it is taken. Nor is it destructive of the extraterritorial effect of a judgment based on constructive service that the defendant, being a citizen of the state, was temporarily absent therefrom, It is sufficient that he was at the time subject to the laws of the state and to the territorial authority of the court." Mr. Black, after quoting approvingly from Harriman v. Roberts, 52 Md. 64, says: "Consequently, if the defendant was subject to the jurisdiction of the state where the action was brought, and process was served upon him in accordance with its laws, as by leaving a copy of the summons at his usual residence, the judgment is presumably valid,
although he was in fact temporarily absent from the state."
52 That these authorities are opposed to the contention of the
appellant will hardly be questioned. But there are cases cited in the opinion by the majority holding to the contrary. Under such conditions I understand it to be our duty to follow the rules adopted by the court of last resort in this state.

But aside from the question of authority, there appears to me to be room for a well merited distinction between the situation presented in the case of the defendant in Pennoyer v. Neff, and others of a similar nature, and that of Mabee. Neff was a resident of the State of California, and was sued and cited by publication in the State of Oregon while still at the place of his residence. Mabee was a resident and citizen of Texas, the state in which he was sued and cited, and was only temporarily absent. There is much reason for holding that Neff, situated as he was, should not be compelled to leave his home, go into a foreign jurisdiction and there defend himself against a claim of personal liability. A rule permitting that to be done would not only deprive such a defendant of the

right to have questions affecting his personal liability determined by the laws and regulations of his domicile, whose protection he had a right to claim, but would render him amenable to foreign laws to which he had in nowise subjected himself. No such considerations can be urged to justify the application of the same rule to the case of Mabee. He was a resident of the state in which he was cited, had voluntarily made it the place of his domicile, In so doing *he* submitted his person to the dominion of the laws of Texas, invoked their protection, and had the right to enjoy such privileges and immunities as they afforded. Certainly he could not complain at being called upon to defend himself in civil litigation at his own home, or object that his rights were to be determined by the laws of the state of his own adoption.

53 But it may be asked, why should it be said that process issued from the courts of this state would reach him while sojourning beyond its territorial limits, and not have the same effect upon a non-resident? If to make it binding upon a non-resident would be giving extraterritorial effect to domestic writs, why would not the same results follow in making them binding upon absent residents? How can it be said that the writs will go beyond the state line and reach one defendant, and not reach all others in the same territory? The difficulty of pointing out an appreciable distinction between the two different situations, and of giving a satisfactory reason for it, is probably the cause of the conflicting views on the subject. But that there is a difference, and that a distinction should be made is, I think, too obvious to be ignored.

The issuance and service of citation in civil suits, as is well known, are intended only for the purpose of giving notice to defendants of the institution of suits against them, and of their nature and purpose, in order that such parties may have an opportunity to present whatever defenses they may see proper. Writs issued for that purpose are not intended to have any compulsory effect; obedience is optional with the party served. Within certain limitations the state may prescribe any form for serving such notice upon its citizens, or those found within its territorial limits, that it deems reasonable and sufficient. Until notice is given in some legally prescribed form, or the defendant voluntarily appears in the suit, no court has the authority to pronounce any judgment against him. To do otherwise would not only violate a statutory requirement, but would disregard a fundamental rule of justice. We come, then, to the question: the state having provided by legislation that notice by publica-

54 tion of a citation is sufficient to empower its courts to determine questions affecting the personal liability of its citizens, or residents, while absent from the state, and to pronounce judgment thereon, is this method so unreasonable and insufficient as to deprive such citizen of his property without due process of law? Using the terms "resident" and "citizen" as synonymous, the resident stands in a different attitude toward the state of his adoption from that occupied by the non-resident. By construction the former, though physically absent, is ever present in the state for the purpose of holding and enjoying certain rights and privileges not accorded to the latter;

as, for instance, a homestead right and other exemptions, the right of local suffrage, and the privilege of having his children patronize the state's public free schools. By residing within its limits and acquiring the right to the benefits conferred by its laws the citizen submits himself to the state's laws and consents to be governed by all of its valid enactments. It is often said that consent can not confer jurisdiction upon a court, but that is true only as to the subject matter in controversy. Consent can confer jurisdiction over the person of the defendant, and the state may prescribe the form by which this consent shall be evidenced. Is it going too far to say that one who takes up his residence within the state, invokes the protection of its laws, and enjoys its rights and immunities, shall be held to have consented that he may be served with notice by publication when temporarily beyond its limits? It is now well settled law that a foreign corporation seeking to do business in another state may be required, as a condition upon which it will be admitted, to designate in advance some person, or place, with whom, or where, citations issued in civil suits against it may be left, and that such service will authorize the recovery of a personal judgment. This
55 exaction may even be extended to the stockholders of the corporation. Wilson v. Seligman, 144 U. S. 41, 36 L. Ed. 338. In the case referred to, after announcing the rule as above stated, the court said: "In such cases the service is held binding because the corporation, or the stockholders, or both, as the case may be, have consented (in advance) that such service within the state shall be sufficient and binding; and no individual is bound by the proceeding who is not a stockholder."

In some states the leaving of a citation at the residence of a defendant is sufficient notice, and will support a personal judgment, by default. I know of no instance in which the reasonableness of such method of giving notice has ever been successfully attacked. Such service would not be vitiated by showing that the defendant was at the time beyond the limits of the state. If not, then why consider void service given by publication under similar circumstances? To hold that constructive service is binding on an absent defendant is not giving such service extraterritorial effect, but is merely saying that the absent citizen is amenable to its intrastate effect. If such an absentee is constructively within the state for the purpose of retaining and exercising his rights as a citizen, I see no good reason why he should not be held amenable to the processes of its courts. He can not claim the benefit of the rights, privileges, and immunities accorded to a citizen and escape the burdens and exactions the state imposes upon citizenship. He can not gather its good things with one hand, and ward off its processes with the other.

In my judgment this case should be affirmed.

HODGES,
Associate Justice.

56 March 9, 1911.

(Endorsed:) No. 732. Henry D. McDonald vs. F. A. Mabee. Dissenting Opinion of Justice Hodges. Filed Mar. 15, 1911.

E. T. Rosborough, Clerk Court of Civil Appeals 6th Supreme Judicial District of Tex. By L. A. Graham, Deputy. Recorded in Book 3, page 1113. Filed in Supreme Court May 8, 1911. F. T. Connerly, Clerk.

57 *Judgment.*

Entered March 9, 1911.

No. 732.

HENRY D. MCDONALD, Appellant,
v.
F. A. MABEE, Appellee.

Appealed from the County Court of Lamar County.

This cause came on to be heard on the transcript of the record, and the same being inspected, and the court being of the opinion that there was error in the judgment, it is therefore considered, adjudged and ordered by the court that the judgment of the court below be reversed; and the court being further of the opinion that the court below should have rendered judgment in favor of appellant, Henry D. McDonald, against appellee, F. A. Mabee, for the sum due on the note sued on as prayed for in said appellant's petition, and for a foreclosure of the attachments liens acquired by the levies on certain lots and tracts of land in Nueces and Duval Counties, and it appearing to the court that there is now due and owing on said note according to its legal effect the sum of one thousand one hundred and ninety-three hundredths dollars ($1,100.93), principal, interest and attorney's fees, it is therefore further considered, adjudged and ordered by the court that said appellant, Henry D. McDonald, do have and recover of and from said appellee, F. A. Mabee, the said sum of one thousand one hundred and ninety-three hundredths dollars ($1,100.93), with interest thereon from this date at the rate of twelve per cent. per annum, and all costs in this behalf expended, both in this court and the court below. And it further appearing to the court that on June 5, 1909, appellant had writs of attachment issued out of the court below to Nueces and Duval Counties respectively; that the writ of attachment issued to Nueces
58 County was by the sheriff of said county levied on the 8th day of June, 1909, on the following described lots and tracts of land as the property of appellee, F. A. Mabee, to-wit:

Situated in Nueces County, Texas, parts of the Enrique Villamed grant and described and known according to the map or plan of the "Bohemian Colony Lands" prepared by A. M. French and dated June —, 1905, and now on file in the office of the County Clerk of Nueces County, Texas, as the East or Southeast Half of farm lot One (1) in Section Four (4) of said "Bohemian Colony Lands," said half being square in shape, 1,320 feet in length on every side and containing forty acres and being same lot conveyed to F. A.

Mabee by A. A. Cecha and wife Anna Cecha by deed dated Dec. 1, 1906, and recorded in Book 22 pp. 34-36 Nueces County Records.

2nd Tract: Also a tract in same "Bohemian Colony Lands" map or plan above referred to. Lots One (1) and two (2) in Section Five (5) and Lots Five (5) and Six (6), Seven (7) and Eight (8) in Section Four (4) said several lots containing 471½ acres and being the same deeded to said F. A. Mabee by A. C. Priday and wife Ines by deed dated Dec. 11, 1906 and recorded in Book 21, pp. 299-301 Nueces County Records. Both the deeds above referred to are specially referred to and adopted as and for a full description of the lots hereby levied on.

And it further appearing to the court that the said writ of attachment issued to Duval County was by the sheriff of that county levied on the 9th day of June, 1909, on the following described lots and tracts of land, to-wit:

First: All that certain piece of land out of large tract of land situated in Duval County, Texas, to-wit: 10-29/54 Ten and twenty nine 54ths acres out of section No. 531 B. S. & F. original
59 grantees and patented to Juan Lopez Saenz said Ten and twenty nine fifty fourths acres being the same acquired by Antonio Serna de Lopez by deed dated April 25, 1905, and being part of same land set apart by decree of *of* the District Court in a deed of Partition of date, Oct. —, 1902, said land being undivided out of said portion set aside to Cecilla S. de Serna by said decree for a better description of said land hereby conveyed, reference is hereby made to the Archives of Duval County, Texas, and being same land described in a deed from Antonio S. de Lopez and Thomas Lopez to F. A. Mabee, recorded in Book "No. 1," pages 306-307, Duval C. Records.

Second. A tract of land lying in said County of Duval and being 7-29/54 acres out of section No. 531 B. S. & F. patented to Juan Lopez Saenz and being a part of 16-29/54 acres out of said Section and also being out of a part of 63-11/18 acres set apart to Cecilia S. de Serna in cause No. 1411 of the Docket of the Dist. Court of Duval County, Texas, and Styled Cecilia S. de Serna et al. vs. S. J. Lancaster, entered at the March Term, 1903, of said Court and being a part of a 49 and a fraction acres transferred by Decilia S. de Serna to Eliseo Serna et al. by deed duly recorded in Book "U" pages 6 to 8, Duval County Records and being the same land conveyed to F. A. Mabee by Eliseo Serna by deed recorded in Book "No. 1," pages 330-332, Duval Co. Records.

Third. A tract of land in said Duval County, Texas, being an undivided interest of 16-29/54 acres out of 49-4/8 acres, same being out of that certain larger survey No. 531 made for B. S. & F. and patented to Juan Lopez Saenz and acquired by Maria Jesua Serna from Cecilia Saenz de Serna by deed dated April 25, 1905, and recorded in Duval County, Texas, and being a part of the same land set apart by decree of the Dist. Court to Cecilia Saenz de Serna
60 in the cause styled Cecilia S. de Serna vs. S. J. Lancaster, et al. and entered at the November Term, 1902, of Duval County

Dist. Court and being the same land conveyed to F. A. Mabee by Maria Jesusa Serna by Deed recorded in Book No. 1, pages 362/364 Duval Co. Records.

It is therefore further considered, adjudged and ordered by the court that the attachment liens acquired by said levies respectively on the lands above described be and the same are hereby foreclosed, and that an order of sale issue to the sheriff of said Nueces County or any constable thereof, and to the sheriff of Duval County or any constable thereof, respectively, directing them to seize and sell as under execution in satisfaction of this judgment the said several lots and tracts of land herein described as so respectively levied on by the respective sheriffs of said Nueces and Duval Counties, and if the proceeds of such sales be insufficient to satisfy this judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the said appellee, F. A. Mabee, as in case of ordinary executions; and that this decision be certified below for observance.

61 *Appellee's Motion for Rehearing.*

Filed March 20th, 1911.

In the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

No. 732.

HENRY D. MCDONALD, Appellant,
v.
F. A. MABEE, Appellee.

Appeal from the County Court of Lamar County.

Appellee comes and respectfully presents this motion for a rehearing of this appeal and as grounds therefor relies upon and specifies the following errors committed by this court:

1.

The court erred in holding that the judgment obtained by appellant against F. A. Mabee in cause No. 5468 in the District Court of Lamar County, Texas, on the note sued on by appellant in the present action, was not a valid and final personal judgment against appellee and such as would support an execution against his property generally, the same having been rendered by a court of general jurisdiction, upon, as shown by the record, citation by publication to appellee, (Tr. 16) issued upon affidavit by plaintiff that defendant, appellee in the present action, was absent from the State of
62 Texas, (Tr. 16) and an inspection of the record failing to show that defendant was a non-resident of the State of Texas

but showing instead, that he was at such time a resident of the State but absent therefrom. (Tr. 15, 16, 17, 18.)

2.

The record in said cause No. 5468, (Tr. 15, 16, 17, 18) and the facts as found by the court below (Tr. 19) showing only absence from the State of Texas of defendant, appellee in the present action, at the time of the issuance and service upon him of citation by publication in cause No. 5468, and failing to show that he was at such time likewise not a citizen and resident of the State of Texas, the court erred in holding that the judgment in cause No. 5468 is not a complete bar to appellant's present action and likewise erred in holding such judgment subject to collateral attack in this proceeding.

3.

The court erred in holding that a judgment rendered against a citizen and resident of Texas upon service of citation by publication issued in accordance with Article 1235, of the Civil Statutes of Texas, is void as a personal judgment and ineffective to support execution against his property generally, and likewise erred in thus holding invalid Article 1235, of the Civil Statutes of Texas, in so far as it is applicable to service upon absent defendants who are citizens and residents of Texas.

4.

The court by its judgment on this appeal has held that portion of Article 1235, of the Civil Statutes of Texas giving the right of issuance and service of citation by publication against absent defendants who are citizens and residents of Texas, to be invalid and
63 contrary to and violative of the constitution, statutes and laws of the United States as construed by the Supreme Court of the United States, and in so holding the court has committed error.

5.

The court by its judgment on this appeal has overruled the decisions of the Supreme Court of the State of Texas holding that one may be absent from the State and yet be a citizen of and resident in the State and therefore amenable to the process of its courts (Horst v. Lightfoot, 132 S. W. (Texas Sup.) 761 @ 762; Martin v. Burns, 80 Texas, 676 @ 678-679; Northcraft v. Oliver, 74 Texas, 162 @ 169; Fernandez v. Casey, 77 Texas, 452; Iliams v. Root, 55 S. W. (Tex. Civ. App. W. D.) 411 @ 412-413) and has refused to follow or to recognize the binding effect upon it of these decisions. In this, the court has committed error. (Jones v. Ry. Co., 23 S. W. (Tex. Civ. App. W. R.) 186; 11 Cyc. 747.

6.

This action being a collateral attack on the judgment in cause No. 5468, of the District Court of Lamar County, Texas, a court of

general jurisdiction, the court erred in considering the following findings by the trial court of facts proven outside the record in cause No. 5468; "I find that F. A. Mabee at the time he joined in the execution of the note sued on, resided in Paris, Lamar County, Texas, and so resided up to the month of April, 1892, when he left Lamar County, Texas, to establish a home at some other place; but I find that Mabee's family continued to reside in Lamar County, Texas, until the spring of 1894, when they left, and have since had their home in St. Louis, Mo. I find that F. A. Mabee in the month of April, 1892, left Paris and the State of Texas, and remained away until November, 1892, when he returned to Paris and re-
64 mained in Paris during the said month of November, when he left again and went to St. Louis, Mo., where he remained from Jan. 1, 1893, to Jan. 1, 1894, though his family still resided in Paris, Texas, from which place they removed to St. Louis in the spring of 1894. I find that from Jan. 1, 1893, to Jan. 1, 1894, defendant F. A. Mabee was absent from the State of Texas, but that his family resided in Paris, Texas, during that time and that he claimed Paris, Texas, as his residence; and that since the spring of 1894, he and his family have resided in St. Louis, Mo." (Hardy v. Beaty, 84 Texas, 562 @ 567; Iliams v. Root, 55 S. W. 411 @ 412.)

Appellant, H. D. McDonald, is a resident of Paris, Lamar County, Texas, and his attorneys of record are Messrs. Moore and Park, who likewise are residents of Paris, Lamar County, Texas.

Wherefore, appellee prays the court to grant him a rehearing in this cause and to affirm the judgment rendered in his favor by the trial court.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Appellee.

65 (Endorsed:) 848/732. Henry D. McDonald, Appellant. No. 732 v. F. A. Mabee, Appellee. Appellee's Motion for Rehearing. Filed Mar. 20, 1911. E. T. Rosborough, Clerk Court of Civil Appeals 6th Supreme Judicial Dist. of Tex. By L. A. Graham, Deputy. Filed in Supreme Court, June 9, 1911. F. T. Connerly, Clerk.

66 *Opinion on Motion for Rehearing.*

Filed April 6, 1911.

In the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

No. 732.

HENRY D. MCDONALD, Appellant,
v.
F. A. MABEE, Appellee.

This opinion in no wise involves either the construction or validity of Art. 1235 giving the right of issuance of citation by publication;

and we further all agree that it should not be understood or interpreted in any wise as holding that this article of the statute is invalid, or violative of the constitution of the United States as beyond the power of the states to enact. The decision here is made purely on the facts of this particular case and the law deemed applicable thereto. We think that the power of the state to provide for service by publication does exist, and in the proper case would be applicable and ruling. The majority of this court think that the question here does not present nor involve the power of the state to provide publication as a mode of service, and that it is entirely aside. There is presented under the facts simply the question of jurisdiction of the court over the person to render personal judgment.

The motion is overruled.

LEVY,
Associate Justice.

April 6, 1911.

(Endorsed:) Filed April 6, 1911. E. T. Rosborough, Clerk, Court of Civil Appeals 6th Supreme Judicial Dist. of Tex. By L. A. Graham, Deputy. Recorded in Book 4, page 15.

67 *Order Overruling Motion for Rehearing.*

Entered April 6, 1911.

No. 848/732.

HENRY D. MCDONALD, Appellant,
v.
F. A. MABEE, Appellee.

Appealed from County Court of Lamar County.

This cause came on to be heard on the transcript of the record and appellee's motion for rehearing, and the court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby overruled.

68 *Proceedings in the Supreme Court of Texas, at Austin.*

Petition for Writ of Error.

Filed May 8, 1911.

In the Supreme Court of Texas.

F. A. MABEE, Plaintiff in Error,
vs.
HENRY D. McDONALD, Defendant in Error.

Petition for Writ of Error.

To the Honorable Supreme Court of Texas:

Petitioner, F. A. Mabee, herewith presents his petition for writ of error and would respectfully represent:

This was a suit brought by Henry D. McDonald as plaintiff in the County Court of Lamar County, Texas, to recover of F. A. Mabee as defendant upon a promissory note for $300, with interest and attorneys' fees, alleged to have been executed by him and one Hollon on March 6, 1891, and to foreclose an attachment lien sued out by plaintiff in this proceeding and levied upon land in Texas belonging to Mabee. Hollon was alleged to be insolvent and was not made a party.

Defendant Mabee, by original answer, plead as res judicata of this suit, a judgment obtained on October 3, 1893, by plaintiff against him and Hollon in cause No. 5468 in the District
69 Court of Lamar County, Texas, on the same note now sued on with foreclosure of vendor's lien on certain land; that this judgment was not appealed from and was final and a complete bar to this action.

Plaintiff McDonald, by supplemental petition, plead that Mabee was at the time of the institution of cause No. 5468, a non-resident of Texas, was served with citation by publication upon affidavit by plaintiff that he was absent from the State and judgment was rendered upon such service and so recites and is therefore invalid as a personal judgment against Mabee and would not support an execution against his property generally.

Defendant, by supplemental answer, excepted to plaintiff's allegations that defendant was actually a non-resident of Texas at the time of the institution of cause No. 5468, as being an attack upon the judgment therein by evidence outside the record; alleged that defendant was a resident of Texas at the institution of cause No. 5468, when affidavit was made for citation by publication, when such citation was issued and published and when judgment was rendered therein.

This action was tried before the court without a jury and judgment was rendered in favor of defendant Mabee, based upon the

court's findings of fact and his conclusion of law that the judgment rendered in cause No. 5468 was a valid judgment in personam against Mabee.

Motion for new trial was duly filed by plaintiff and having been overruled his appeal was duly perfected to the court of civil appeals for the Sixth Supreme Judicial District, which court, on March 9, 1911, by majority opinion, Justice Hodges dissenting, reversed and rendered the judgment of the trial court because of error by the trial court in its holding that the judgment in issued was a valid personal judgment.

70 Petitioner, on March 20, 1911, and within the time prescribed by the law and the rules of this court, filed his motion for a rehearing, which was overruled by the court of civil appeals on April 6, 1911.

Petitioner assigns the following errors prejudicial to him, committed by the court of Civil Appeals for the Sixth Supreme Judicial District, and which were by him presented to such court in his motion for a rehearing:

1.

The court erred in holding that the judgment obtained by appellant against F. A. Mabee in cause No. 5468 in the District Court of Lamar County, Texas, on the note sued on by appellant in the present action, was not a valid and final personal judgment against appellee and such as would support an execution against his property generally, the same having been rendered by a court of general jurisdiction, upon, as shown by the record, citation by publication to appellee, (Tr. 16) issued upon affidavit by plaintiff that defendant, appellee in the present action, was absent from the State of Texas, (Tr. 16) and an inspection of the record failing to show that defendant was a non-resident of the State of Texas but showing instead, that he was at such time a resident of the State but absent therefrom. (Tr. 15, 16, 17, 18.)

2.

The record in said cause No. 5468, (Tr. 15, 16, 17, 18) and the facts as found by the court below (Tr. 19) showing only absence from the State of Texas of defendant, appellee in the present action, at the time of the issuance and service upon him of citation by publication in cause No. 5468, and failing to show that he

71 was at such time likewise not a citizen and resident of the State of Texas, the court erred in holding that the judgment in cause No. 5468 is not a complete bar to appellant's present action and likewise erred in holding such judgment subject to collateral attack in this proceeding.

3.

The court erred in holding that a judgment rendered against a citizen and resident of Texas upon service of citation by publication issued in accordance with Article 1235, of the Civil Statutes of

Texas, is void as a personal judgment and ineffective to support execution against his property generally, and likewise erred in thus holding inv[illegible]d Article 1235, of the Civil Statutes of Texas, in so far as it is applicable to service upon absent defendants who are citizens and residents of Texas.

4.

The court, by its judgment on this appeal, has held that portion of Article 1235 of the Civil Statutes of Texas giving the right of issuance and service of citation by publication against absent defendants who are citizens and residents of Texas, to be inval-d and contrary to and violative of the constitution, statutes and laws of the United States as construed by the Supreme Court of the United States, and in so holding the court has committed error.

5.

The court, by its judgment on this appeal, has overruled the decisions of the Supreme Court of the State of Texas holding that one may be absent from the State and yet be a citizen of and resident in the State and therefore amenable to the process of its courts (Horst v. Lightfoot, 132 S. W. (Texas Sup.) 761 @ 762; Martin v. Burns, 80 Texas, 676 @ 678-679; Northcraft v. Oliver, 74 Texas, 162 @ 169; Fernandez v. Casey, 77 Texas, 452; Illiams v. 72 Root, 55 S. W. (Tex. Civ. App. W. D.) 411 @ 412-413) and has refused to follow or to recognize the binding effect upon it of these decisions. In this the court has committed error. (Jones v. Ry. Co., 23 S. W. (Tex. Civ. App. W. R.) 186; 11 Cyc. 747).

6.

This action being a collateral attack on the judgment in cause No. 5468 of the District Court of Lamar County, Texas, a court of general jurisdiction, the court erred in considering the following findings by the trial court of facts proven outside the record in cause No. 5468. "I find that F. A. Mabee, at the time he joined in the execution of the note sued on, resided in Paris, Lamar County, Texas, and so resided up to the month of April, 1892, when he left Lamar County, Texas, to establish a home at some other place; but I find that Mabee's family continued to reside in Lamar County, Texas, until the spring of 1894, when they left, and have since had their home in St. Louis, Mo. I find that F. A. Mabee, in the month of April, 1892, left Paris and the State of Texas and remained away until November, 1892, when he returned to Paris and remained in Paris during the said month of November, when he left again and went to St. Louis, Mo., where he remained from Jan. 1, 1893, to Jan. 1, 1894, though his family still resided in Paris, Texas, from which place they removed to St. Louis in the spring of 1894. I find that, from Jan. 1, 1893, to Jan. 1, 1894, defendant F. A. Mabee was absent from the State of Texas; but that his family resided in Paris, Texas, during that time and that he

claimed Paris, Texas, as his residence; and that since the spring of 1894 he and his family have resided in St. Louis, Mo." (Hardy v. Beaty, 84 Texas, 562 @ 567; Iliams v. Root, 55 S. W., 411 @ 412.)

73 Petitioner alleged that this court has jurisdiction of the Writ of Error prayed for by reason of the fact that this case and its determination by the Court of Civil Appeals and the errors assigned by appellant as committed by the trial court, all as shown by the record, involve the validity of a statute of this State, namely that portion of Article 1235 of the Civil Statutes of Texas giving the right of issuance and service of citation by publication against absent defendants who are citizens and residents of Texas, as being contrary to and in violation of the Constitution, statutes and laws of the United States.

Petitioner further says that defendant in error, Henry D. McDonald, is a resident of Paris, Lamar County, Texas, and his attorneys of record are Messrs. Moore & Park, who likewise are residents of Paris, Lamar County, Texas.

Wherefore, petitioner prays that Writ of Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, be granted, and that upon hearing thereof the judgment of the Court of Civil Appeals be reversed and that of the County Court of Lamar County be in all respects affirmed.

LIGHTFOOT, LONG & WORTHAM,
Attorneys for Petitioner.

(Endorsed:) App. No. 7273. In the Supreme Court of Texas. F. A. Mabee, Plaintiff in Error, vs. Henry D. McDonald, Defendant in Error. Petition for Writ of Error. Filed May 1, 1911, E. T. Rosborough, Clerk Court of Civil Appeals 6th Supreme Judicial District of Texas. By L. A. Graham, Deputy. Filed in Supreme Court, May 8, 1911. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Granted.

74 *Order Granting Writ of Error.*

June 7, 1911.

App. No. 7273.

F. A. MABEE
vs.
HENRY D. MCDONALD.

From Lamar Co., 6th District.

This day came on to be heard the application of F. A. Mabee for a writ of error to the Court of Civil Appeals for the Sixth District and the same having been duly considered, it is ordered that

said application be granted and the writ of error issue as prayed for, upon the filing by the applicant of a bond in the sum of two hundred dollars conditioned to pay the costs of this court, of the Court of Civil Appeals and of the District Court, payable to the adverse parties as prescribed by law.

Bond for Costs.

Filed June 14, 1911.

In the Supreme Court of Texas.

F. A. MABEE, Plaintiff in Error,
vs.
HENRY D. MCDONALD, Defendant in Error.

Whereas, at a regular term of the Supreme Court of the State of Texas, F. A. Mabee, plaintiff in error, having theretofore
75 filed his application in said court for a writ of error to review a judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas, reversing and rendering — a certain cause then pending therein, wherein Henry D. McDonald was appellant and F. A. Mabee was appellee, the Supreme Court, plaintiff in error having given no bond in this cause, by an order made and entered of record on the 7th day of June, 1911, specified that plaintiff in error, as a condition precedent to his right to have said writ of error granted, should enter into bond in the sum of $200.

Now, therefore, we, F. A. Mabee, plaintiff in error, as principal, and F. D. Mallory and J. C. Gibbons, as sureties, acknowledge ourselves bound to pay to Henry D. McDonald, defendant in error, the sum of $200, conditioned that F. A. Mabee, plaintiff in error, shall prosecute his writ of error with effect, and shall pay all the costs which have accrued in the court below, and which have accrued in the Court of Civil Appeals, and which may accrue in the Supreme Court.

Witness our hands this the 13th day of June, 1911.

F. A. MABEE, *Principal,*
By LIGHTFOOT, LONG & WORTHAM,
Attorneys of Record.
F. D. MALLORY, *Surety.*
J. C. GIBBONS, *Surety.*

This bond is approved and filed this 13th day of June, 1911.
[SEAL.] JOHN S. BAKER,
Clerk County Court, Lamar Co., Tex.

THE STATE OF TEXAS,
County of Lamar:

I, John S. Baker, Clerk, County Court, Lamar County, do hereby certify that the reverse side of this sheet contains a true and correct

copy of a bond executed by F. A. Mabee as Principal and F. D. Mallory and J. C. Gibbons as sureties, payable to Henry D. McDonald defendant in Error in Cause of F. A. Mabee plaintiff in error vs. Henry D. McDonald defendant in error pending in the Supreme Court of Texas, and filed and approved by me, this 13th day of June, 1911, and deposited by me with the papers in said cause in the County Court of Lamar County, Texas, entitled
76 Henry D. McDonald v. F. A. Mabee."

To certify which I hereunto set my hand and affix the seal of the County Court of Lamar County Texas this the 13th day of June, 1911.

[SEAL.] JOHN S. BAKER,
Clerk County Court, Lamar County, Texas.

(Endorsed:) Bond. F. A. Mabee vs. H. D. McDonald. Filed in Supreme Court Jun- 14, 1911. F. T. Connerly, Clerk.

Waiver of Citation.

Filed March 20, 1912.

F. A. MABEE, Plaintiff in Error,
v.
H. D. McDONALD, Defendant in Error.

Error from the Court of Civil Appeals for the Sixth Supreme Judicial District.

H. D. McDonald, Defendant in error, hereby waives the issuance and service of the citation in error and enter- his appearance herein.

H. D. McDONALD,
Def't in Error.

(Endorsed:) No. 2299. F. A. Mabee, plaintiff in error. Waiver of issuance and service of citation in error. H. D. McDonald, Defendant in error. Waiver of Citation in Error. Filed in Supreme Court Mch. 20, 1912. F. T. Connerly, Clerk.

Order of Submission.

April 9, 1913.

No. 2299.

F. A. MABEE
vs.
HENRY D. McDONALD.

From Lamar County, Sixth District.

Submitted upon briefs for both parties and orally for Def't in error.

77 *Opinion by Mr. Associate Justice Hawkins.*

Filed April 14th, 1915.

No. 2299.

F. A. MABEE, Plaintiff in Error,
vs.
HENRY D. McDONALD, Defendant in Error.

(From Lamar County, Sixth District.)

McDonald sued Mabee on June 5, 1909, in the County Court of Lamar County, upon a promissory note for $300.00, besides interest and attorney's fees, alleged to have been executed by him and one Hollon, and to foreclose a lien under a writ of attachment sued out by plaintiff in said suit and levied upon land in Texas as the property of Mabee. Hollon was alleged to be insolvent and was not made a party defendant.

Mabee answered. Among other defenses which were interposed by him he pleaded in bar of plaintiff's action a former judgment recovered on October 3, 1893, by the plaintiff, McDonald, against him and Hollon in cause No. 5468 in the District Court of Lamar County, Texas, for the sum of $431.97; that said judgment was rendered in a suit on the same note upon which this suit is based, and that the debt evidenced by that note was merged in that judgment, and, therefore, this suit should not be maintained. Said answer alleged that said judgment was against said Mabee and said Hollon, personally, for the amount stated, and against them and
their co-defendants in said cause No. 5468 for foreclosure
78 of a vendor's lien upon certain land in Lamar County,
Texas, securing said note; that said judgment has never been appealed from and is valid and final; and that said note and plaintiff's cause of action thereon have long since become merged in said judgment, and the matter is res adjudicata.

In response McDonald filed a supplemental petition, alleging, among other things, that at the time of the institution by him of said cause No. 5468 in said District Court said Mabee was a nonresident of the State of Texas, but that, erroneously supposing him to be a resident of said State, plaintiff so alleged in his original petition in said suit, and in pursuance thereof citation in that cause was issued to Lamar County, Texas, for defendant Mabee, but, upon the Sheriff's return thereon being made showing Mabee to be out of said State, plaintiff filed an affidavit stating that Mabee was absent from the State of Texas, and praying that he be cited by publication; that such citation was thereupon issued and published according to law, and thereafter, on October 3, 1893, judgment was duly rendered in said cause against defendants Mabee and Hollon for $431.97, the amount of said note, and against all of the defendants for foreclosure of the vendor's lien upon certain land; that the record in said cause No. 5468 shows and that the judgment

therein upon its face shows that defendant Mabee had been cited in said cause by publication only, and also shows upon its face that it was rendered upon such service and upon that only, and that Hollon was personally served with process; and that by reason of said facts said judgment is not and never was a personal judg-
79 ment against said Mabee, and never had any force or effect except as a means of reaching, and enforcing said vendor's lien upon, said land.

In reply to said supplemental petition defendant Mabee filed a supplemental answer, in which he excepted to plaintiff's allegation that Mabee was a non-resident of Texas at the time of the institution of said cause No. 5468, as being an attack upon the judgment therein by evidence outside of the record, and alleged that defendant, Mabee, was a resident of the State of Texas at the institution of said cause No. 5468, and when said affidavit for citation by publication was made, and when said citation was issued and published, and when judgment in said cause was rendered.

This County Court case was tried before the court without a jury, and resulted in a judgment in favor of defendant Mabee. That court filed its findings of fact and conclusions of law to the effect that said District Court judgment, in cause No. 5468, was a valid judgment, in personam, against Mabee.

That trial court found, as facts: That the note sued on in this cause was the identical note which was sued on by the same plaintiff McDonald, in cause No. 5468, in the District Court of Lamar County, Texas; that in said cause, No. 5468, Mabee was duly cited by publication issued on application and affidavit stating that he was absent from the State of Texas; that he was given no other notice of that suit, and did not enter his appearance therein; and that, as was disclosed upon its face, the judgment against Mabee in that cause was based solely upon said citation by publication.

The trial court further found as facts, that on March 6, 1891, the date upon which Mabee joined in the execution of said
80 note, he resided in Lamar County, Texas, and so resided up to the April, 1892, when he left that county to establish a home at some other place; that his family continued to reside in Lamar County until the Spring of 1894, when they left, and have since had their home in the State of Missouri; that in April, 1892, Mabee left Lamar County and the State of Texas, and remained away until November, 1892, when he returned to Lamar County, and remained there during said month of November, when he again left there and went to St. Louis, Missouri, where he remained from January 1, 1893, to January 1, 1894, though his family resided in said Lamar County, when they removed to St. Louis, Missouri, in the Spring of 1894; that from January 1, 1893, to January 1, 1894, Mabee was absent from the State of Texas, but that his family resided in Paris, Lamar County, Texas, during that time, and he claimed said Paris as his residence; and that since the Spring of 1894 he and his family have resided in St. Louis, Missouri.

The trial court further found, as facts, that said cause No. 5468

was filed November 30, 1892; that personal citation therein to Mabee and Hollon was issued December 29, 1892, directed to the sheriff or any constable of Lamar County, Texas, returnable to the April, 1893, term, and was returned by the sheriff on December 30, 1892, duly served as to Hollon but not executed as to Mabee, and with the endorsement as to him: "Learned to be out of the State of Texas;" that McDonald's affidavit for citation by publication for Mabee was made and filed and such citation to Mabee by publication duly issued on February 20, 1893, and was duly
81 published; and that the judgment of October 3, 1893, in that cause was against said Mabee personally, as well as for foreclosure of the vendor's lien and *and* sale of said land, and awarded execution, generally, against Mabee and Hollon, in the event the land which was ordered sold should bring less than the amount of the judgment. The findings of fact by the Court of Civil Appeals are to the same effect. All material facts as they were so found by the trial court and by the Court of Civil Appeals are accepted and will be treated by this court as the facts of this case.

Upon appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, that court reversed the judgment of the County Court, and rendered judgment in favor of appellant, McDonald, the decision being by a divided court, the majority opinion being by Associate Justice Levy, and the dissenting opinion being by Associate Justice Hodges. McDonald v. Mabee, 135 S. W. 1089.

McDonald's plea in the County Court, setting up invalidity of said District Court judgment for lack of sufficient service upon Mabee therein, constitutes an attack, not upon a judgment of a sister State, but upon a domestic judgment. Moreover, it is not a direct, but a collateral attack, this action having arisen and said plea having been interposed in a court different from that in which the judgment which is therein attacked was rendered. As was well said by Associate Justice Hodges in said dissenting opinion: "This being an action instituted in the county court, any issue questioning the validity of a judgment rendered in the district court necessarily presents a collateral, and not a direct, impeachment.
82 In a collateral attack the validity of a domestic judgment must be determined by the record itself, and not by evidence aliunde. Martin v. Burns, 80 Texas, 679, 16 S. W. 1072; Murchison v. White, 54 Texas, 82; Treadaway v. Eastburn, 57 Texas, 213; Holt v. Love, 131 S. W. 857; Hardy v. Beatty, 84 Texas, 562; 19 S. W. 778; Horst v. Lightfoot, 132 S. W. 761. Hence it follows that the findings of the trial court with reference to Mabee's residence at the time of the original suit and the publication of citation, are wholly immaterial and add nothing by way of supporting the judgment from which this appeal is prosecuted." However, in order that all the facts may be clearly understood, we have thought it best to set them out at length.

Again, as was pointed out in said dissenting opinion: "The situation presented is somewhat peculiar. The attack upon the validity of that judgment" (referring to the judgment in cause No. 5468)

"is made by the plaintiff, the one who presumably would insist upon its validity, while its validity is asserted by the defendant, the party who would ordinarily be expected to make the assault. That peculiarity, however, will not be considered as affecting the question before the court."

Plaintiff in error, Mabee, brings this case before us for review upon six assignments of error.

The sixth assignment complains of the alleged action of the Court of Civil Appeals in considering the findings of fact by the trial court concerning the actual place of residence of Mabee, apart from what is shown upon that point by the record in said cause No. 5468.

83 It is true that the opinion of the majority of that court sets out the findings of fact in question, but we are unable to find that they permitted those facts to control or even influence their decision in the case. On the contrary, as we understand their opinion, they hold, squarely, that upon the facts disclosed by the record and shown upon the face of the judgment in said cause No. 5468 that judgment was not valid as a personal judgment against Mabee. In said opinion they say: "The facts positively appearing, as they do, upon the record, any presumption of fact that would be required to be indulged in a collateral attack upon a judgment here ceases, and the question becomes one of law." The entire record of the case, including an affidavit and application for citation by publication, may be considered in aid and support of a domestic judgment. Horst v. Lightfoot, 103 Texas, 643; Hardy v. Beatty, 84 Texas, 562; Jams v. Root, 55 S. W. 411. Nor have we been able to discover that there is any conflict whatever between the material facts concerning the citizenship, or place of residence, of Mabee, or his absence from the State of Texas, or service upon him, as shown by the record and judgment in said cause No. 5468, and the facts concerning all or any of those features as found by the County Court and by the Court of Civil Appeals in this case. It is evident, therefore, that even though the majority of the Court of Civil Appeals had considered and relied upon said findings of extraneous facts by the trial court their own decision, in all reason, would have been precisely what it was when predicated upon the facts disclosed by the record, including the judgment, in said cause No. 5468. We find no merit in said sixth assignment of error, and it is overruled.

84 The other five assignments of error complain solely of the action of the Court of Civil Appeals in upholding the validity of the judgment of the District Court in said cause No. 5468 as a personal judgment against Mabee, so they will be considered together.

That was the judgment of a duly established court of this State, of general and competent jurisdiction, rendered against an absent citizen of the State of Texas upon citation by publication only, yet in strict compliance with the laws of this State, which provide for such proceedings in personal actions for debt as well as in actions affecting title to or liens upon land.

The record in that cause, including the judgment itself, shows such compliance.

Said judgment was in all respects unquestionably regular, and was valid, as a proceeding in rem, insofar as it related to or concerned and accomplished the subjection of the land which it described to the vendor's lien thereon securing the purchase money note executed by Mabee which was sued upon in that cause and in the cause at bar. Pennoyer v. Neff, 95 U. S. 714; York v. State of Texas, 73 Texas, 651. Indeed, this much has been conceded throughout this entire case.

But defendant in error, McDonald, strenuously insists that because, as to Mabee, it was based upon citation by publication only, and he made no personal appearance in the cause in which it was rendered, said judgment was not valid as a personal judgment against Mabee, and, consequently, said note did not merge into said judgment, as contended by Mabee, and said judgment is not
85 a bar to McDonald's action upon said note in the County Court case which is before us. McDonald contends that when said judgment is considered as a purely personal judgment against Mabee the citation by publication upon which, alone, it rests, did not afford to Mabee "due process of law," within the terms of the Fourteenth Amendment to the Constitution of the United States. Mabee insists that it did. This, then, is the only real issue in the case at bar.

If said citation by publication, under the circumstances, was not in "due course of the law of the land," and did not constitute "due process of law," as an adequate basis for such personal judgment against Mabee, said judgment was indeed invalid as a personal judgment against him, said note did not merge therein, the judgment of the County Court in this cause was erroneous, and the decision of the Court of Civil Appeals therein in favor of McDonald should be upheld.

Conversely, if said citation by publication was in due course of the law of the land, and afforded to Mabee due process of law in regard to the personal action against him, in that cause, for debt, said judgment was valid as a personal judgment against him, the note merged therein, the judgment of the County Court in this cause and the conclusion announced in said dissenting opinion of Associate Justice Hodges are sound, and said decision of the Court of Civil Appeals must be reversed and the judgment of the County Court in favor of Mabee must be affirmed.

The Fourteenth Amendment to the Constitution of the United States declares: "No state shall make or enforce any law
86 which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 19, of the Constitution of Texas is as follows: "No citizen of this state shall be deprived of life, liberty, property,

privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

The Revised Statutes of Texas, adopted in 1911, Title 37, contain the following provisions relative to citation by publication from the district and county courts of this State, and review of judgments based thereon, which statutory provisions, substantially, have all been in force since prior to the filing of said district court cause No. 5468:

"Art. 1874. (1235) (1235) Citation by publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending; but if there be
87 no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once in each week for four consecutive weeks previous to the return day thereof. (Acts March 16, 1848, p. 106, sec. 13; March 15, 1875, p. 170, sec. 1, Acts 1879, ch. 96, p. 103, P. D. 25.)"

Art. 1876, (1237) (1237) provides, in substance, that such citations shall contain the requisites prescribed by the statute for ordinary citations.

"Art. 1941. (1346) (1212, 1345). Procedure in case of service by publication where no answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit. (Acts 1846, p. 363, sec. 128. Acts 1866, p. 125, sec. 1, P. D. 1488, 26.)"

That all the proceedings in said cause No. 5468 were in full compliance with these statutes has not been questioned, but is admitted.

"Art. 2026. (1375) (1373) Bill of review in suits by publication.—In cases in which judgment has been rendered on service of process by publication, where the defendant has not ap-
88 peared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed

within two years after the rendition of such judgment. (Id. sec. 129. P. D. 1489.)"

All of the foregoing statutory provisions should be considered together, upon the issue before us. Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Corliss v. Corliss, 8 Vt. 373. See, also, dissenting opinion of Mr. Justice Hunt in Pennoyer v. Neff, 95 U. S. 736, and references therein to similar statutes in various States.

In construing the Thirteen and Fourteenth Amendments, for the first time, in the Slaughter House Cases, 16 Wall. 67, the Supreme Court of the United States said:

"We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several states to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."

Very often, since then, that court has been called upon to exercise its jurisdiction under that "due process" clause. Thirty-seven years ago, with reference to it, that court was moved to declare:

"In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the
89 clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." Davidson v. New Orleans, 96 U. S. 104.

That clause in the 5th and 14th amendments has aptly been termed "those last resorts of desperate cases." Com. v. Phila., etc., Coal Co., 145 Pa. St. 286.

Withal, so far as has been pointed out to us, or we have been able to find, the precise question which the case at bar presents,—the question as to the authority of a court of a State to bind one of its absent citizens by a personal judgment based upon constructive service by publication only—has never been decided by that tribunal.

No useful purpose would be subserved, perhaps, by entering here upon an exhaustive discussion of the definition, purpose, legal meaning and application of "due process of law," as that expression is employed in the Fourteenth Amendment. However, the question immediately before us is one of great importance; the decisions of courts of last resort in several States conflict thereon, and in several of them, as in the case at bar in the Court of Civil Appeals, vigorous and able dissenting opinions have been filed; the decisions of even the Supreme Court of the United States upon questions relating to the sufficiency and validity of constructive or substituted

service present great divergence of views and also numerous
90 dissenting opinions; the opinions of this court bearing upon the point here involved have dealt with it but briefly; and by reason of these facts, collectively, we feel impelled to make at least a general survey of that field.

Magna Carta, which was wrung from King John by the barons, the clergy and the commoners of England, in 1215, was based upon several earlier charters from sovereigns of England, ranging back to one granted by Williams of Normandy, and was designed to restore to the people of England various rights and privileges of life and property which had been ruthlessly usurped by the reigning sovereign.

That unchaptered original Great Charter, which, several times thereafter, was reissued in amended form, contained this guaranty: "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land. Stubbs, 1 Const. Hist. Eng. 577; Chap. 29, Magna Carta of 9 Hen. III. "Law of the land," in that historic and precious document probably related back to established rights and usages which that people had previously enjoyed, in contradistinction to Roman or civil law, James v. Reynolds' Adm'rs., 2 Tex. 250, Kalloch v. Superior Ct., 56 Calif., 229, Coke, Inst. 2, 46, and also emphasized the distinction between trial by wager of battle or by ordeal and trial by one's peers. Pomeroy's Const. Law Sec. 245. But in both England and America that clause has been given a different and much broader meaning as we shall presently see. McGehee, in his work on "Due Process of Law," traces, through the mutations of Magna Carta and various English statutes of the fourteenth century and the constitutional contests of the seventeenth century, the evolution of "law of the land" into "process of law" and "due process of law," and in so doing says of
91 Magna Carta: "Such a document, looked to by each succeeding generation as a living guaranty of rights, is naturally interpreted in each age according to the needs of the time. The broad construction which was given to the 39th chapter by the statesmen and lawyers of the seventeenth century during the constitutional struggles with the Stuarts, became fixed in the commentaries of Coke and subsequent writers, and in the period of our Revolutionary War was woven into the very texture of American constitutional law." The reference is to the said portion of another reissue of Magna Charta.

In addressing the Georgia Bar Association in 1903, Chief Justice Alton B. Parker, of the New York Court of Appeals, said: "In a work upon the Fourteenth Amendment of the Constitution of the United States, published but a few years ago, it is stated that the words 'due process of law' were probably first used in the Petition of Right of Charles I., A. D. 1628, whereas the fact is that in chapter 3 of the Statutes of 28 Edward III., passed 274 years before the Petition, and entitled, 'None shall be condemned without Trial,' we find that no man 'shall be put out of Land or Tenement, nor

taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to answer by due Process of Law.' * * * While the phrase came to us from England it is far more potential under our system of government than it is or ever was in England. There it restrained the King, not parliament. Here it operates upon every department of Federal and State government—executive, legislative and judicial." (American Law Review, Vol. 37, No. 5, p. 41.)

The phrase "due process of law" had no place in the Constitution of the United States as adopted in 1787. It first found its
92 way into the Fifth Amendment, which was adopted in 1798. More than seventy years later, in 1868, it was incorporated in the Fourteenth Amendment. The same expression, or some words of similar import, such as "due course of the law of the land," have been embodied in the Constitution of almost every American State. The Fourteenth Amendment radically restricted the powers of the States and correspondingly extended the jurisdiction of the Supreme Court of the United States. It clothed that high tribunal with ultimate authority to determine and declare whether or not any particular statute of any State affecting life, liberty or property, does or does not constitute a denial of "due process of law" within the scope and meaning of that amendment. Decisions of any and all other courts upon that question, therefore, are valuable merely as side-lights.

"Due process of law," as used in the Fourteenth Amendment, and "due course of the law of the land," as used in Art. 1, Sec. 19 of the Constitution of Texas and in the constitutions of many of her sister States, according to the great weight of authority, are, in nearly, if not all, respects, practicaly synonymous. Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272; Walker v. Sauvinet, 92 U. S. 90; Huartado v. California, 110 U. S. 523, and authorities cited; McGehee's Due Process of Law, pp. 10-35; 8 Cyc. 1081, closing par. of Note 59, and 1083, note 63; Words & Phrases, Vol. 3, p. 2228.

The general purpose of the expression "due process of law" in the Fourteenth Amendment was to prevent encroachment by the States against life, liberty and property, just as the purpose
93 of that identical phrase in the Fifth Amendment was to prevent such encroachments by the National Government. Hibben v. Smith, 191 U. S. 325.

(*d*) "Due process of law" has been variously defined and treated, as follows: "An exertion of the power of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." Cooley's Const. Lim. 356; Beyman v. Black, 47 Texas, 571; G. C. & S. F. Ry. v. Ellis, 18 S. W. 723.

"By the 'law of the land' is clearly intended the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." Webster, in

argument in Dartmouth College v. Woodward, 4 Wheat. 518; Grigsby v. Peak, 57 Texas, 142; U. C. Ins. Co. v. Chowning, 86 Texas, 654; Armstrong v. Traylor, 87 Texas, 601; Wichita Elec. Co. v. Hinckley, 131 S. W. 1192; Words and Phrases, Vol. 3, p. 2232.

"Law in its regular course of administration through courts of justice." Chancellor Kent, 2 Com. 13, citing Story on Const. Vol. 3, 264, 661; 8 Cyc. 1081, note 59; Words and Phrases, Vol. 3, p. 2236.

"A course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." Pennoyer v. Neff, 95 U. S. 733. This definition has been very generally
94 approved. Words and Phrases, Vol. 3, p. 2234; G. C. & S. F. Ry. v. Ellis, supra.

"In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts." Ex parte Wall, 107 U. S. 289.

"Any process known to the law, criminal or civil, at the time when the provision was adopted. * * * The inhibitions of the Constitution which prohibit Congress from any material change of processes known to the jurisprudence of England and the United States at the time of their adoption must be understood to be confined to those that would affect the people's rights to life, liberty and property as then existing, and not to cripple Congress in any proposed changes not affecting those rights." Waples' Proceedings In Rem, pp. 26, 28.

"It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend." Note to Flint River Steamboat Co. v. Foster, (Ga.) 48 Am. Dec. 272; Matter of Empire City Bank, 18 N. Y. 200; Rockwell v. Nearing, 35 N. Y. 202.

"Due process of law does not necessarily mean that the person affected thereby should have personal notice of the proceeding. Either actual or constructive notice is sufficient, and answers every purpose of the law, if it be reasonably probable that he will be apprised of the proceeding." State v. Dist. Ct. St. L. Co., 90 Minn. 457, citing Cooley's Const. Lim. 6th Ed. 497, Note 1; 10 Am. & Eng. Ency. L. 2nd Ed. 299; Mason v. Messenger, 17 Iowa,
95 261; Happy v. Mosher, 48 N. Y. 313.

"One which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our sys-

tem of jurisprudence for the security of private rights." Hagar v. Reclamation District, 111 U. S. 708, citing Huartado v. U. S. 110 U. S. 516.

Various courts have held that "due process of law" means such general legal forms and course of procedure as were either known to the common law, or as were generally recognized in this country at the time of the adoption of the Constitution. But many other courts have held that rule too restrictive. Brown v. Levee Comr's. 50 Miss. 468.

In Murray's Lessee's Case, 18 How. 272, the Supreme Court of the United States prescribed this test: "We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and which are not shown to have been unsuited to their civil and political condition by having been acted upon by them after the settlement of this country."

96 In Hurtado's Case, 110 U. S. 529, after quoting, as above from the case last mentioned, the court said: "This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law. But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

And in the same opinion, in referring to the "broad and general maxims of liberty and justice," the court said: "Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and re-

97 strict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property." That opinion also speaks of "due process of law," as used in the Fourteenth Amendment, as "that law of the land in each State which derives its authority from the inherent and reserved power of the State, exerted within the limits of those fundamental principles

of liberty and justice which lie at the base of all our civil and political institutions." And after quoting approvingly from Brown v. Levee Commissioners, 50 Miss. 468, wherein it was said with reference to "due process of law," "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized," and from Loan Association v. Topeka, 20 Wall. 655, wherein it was said: "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all but a despotism," that court of last resort in such cases thus prescribed the test: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." In another case that court said:

"This court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by
98 laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States — Cruikshank, 92 U. S. 542, 554; Leeper v. Texas, 139 U. S. 462, 468." Chi. B. etc. v. Chicago, 166 U. S. 234.

"Due process of law, as the meaning of the words have been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing." McGehee's Due Process of Law, p. 1.

"It seems impossible to give a definition which is at once perspicuous and satisfactory." Hodge v. Muscatine County, 121 Iowa, 482.

"It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law" remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the Constitution of the several States of the United States." * * *

"If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more use-
99 ful construction could be furnished by this or any other court to any of the fundamental law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent

and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 101.

In many early cases, in various States, it was held that a personal judgment against a non-resident, based solely upon constructive or substituted service, conformably to a State statute, was valid for all purposes within the State in which judgment thereon was rendered, even though such judgment was not valid, or entitled to recognition, in a sister State.

Wheeler, J., said, in McMullen v. Guest, 6 Texas, 279: "The plaintiff is a resident of the State, and is entitled to the process of the court to protect and enforce his legal rights against a non-resident whose person or property he may find subject to that process. He may sue the non-resident as a 'transient person,' under the provision of the 1st section of the act of 1846, (Hart. Dig., p. 241), if found temporarily sojourning here; and if not to be so found, the object of the statute under which this suit was brought doubtless was to enable him to sue and obtain service by publication. The non-residence of the defendant constitutes no objection to the jurisdiction,
100 however the judgment might be regarded if sought to be enforced in a foreign State. (Story on Con. Laws, secs. 539, 540, 548, 549, and notes; 9 Mass. R., 466.)"

To the same effect was Campbell v. Wilson, 6 Texas, 389, wherein it was declared that the doctrine of international law under which service upon a non-resident by means of attachment upon property within the State should be treated to all intents and purposes as a proceeding in rem and will not support a personal judgment to the extent of reaching beyond the property attached, must yield, at least within such state, to the superior force of a conflicting statute; but in that instance the defendant had subjected his person to the jurisdiction of the court by appearing and answering to the merits.

And in Thouvenin v. Rodrigues, 24 Texas, 477-8, it was said: "Whatever effect may be given to the judgments of one state, when sought to be enforced in the courts of another, however they may be regarded in the courts of the latter state, when rendered without personal service on the defendant, it is perfectly well settled, that if rendered upon constructive service, authorized by the laws of the state where rendered, they will be held to be as valid and binding by its courts, to the extent of their operation by the local law, as if rendered upon person- service on the defendant. It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For, in respect to its own resident citizens, it is undoubtedly com-
101 petent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process; the notice which shall be given to defendants; and to declare the effect of a judgment rendered in pursuance of such notice." Freeman on Judgments, Sec. 567.

But the view that the same judgment might be valid in one and invalid in another State was untenable on principle, and seems to have been abandoned, generally, in view of what was held and said in Pennoyer v. Neff, 95 U. S. 714, decided in October, 1877. Barkman v. Hopkins, 11 Ark. 157.

That the judgments of each State shall have the same force and effect in other States was provided, in substance, by the Constitution of the United States, Art. IV, Sec. 1, and by the Act of Congress of May 26, 1790. But those provisions were not designed to prevent inquiry into either the jurisdiction of the court or the right of the State authority over the person or the subject matter. D'Arcy v. Ketchum, 11 Howard, 165; Barkman v. Hopkins, 11 Ark. 157, and cases cited; Story on Const. 175, 178, 183.

The effect of the D'Arcy Case was that if the court of the sister State found that the non-resident defendant had been personally served in the state in which judgment was rendered, with statutory process, it was required to uphold the personal judgment; but, if it found that the defendant had not been so personally served, and had not submitted himself to the jurisdiction, it was under no obligation to recognize such judgment as valid. See also Thompson v. Whitman, 18 Wall. 460; Knowles v. Gaslight and Coke Co., 19 Wall. 61; Lafayette Ins. Co. v. French, 18 How. 404.

102 Long prior to Pennoyer v. Neff, and prior to the adoption of the 14th Amendment, various State courts and the Supreme Court of the United States itself had held that no purely personal judgment against a non-resident could be predicated upon any character of constructive service, without personal appearance. D'Arcy v. Ketchum, supra; Barkman v. Hopkins, supra, and authorities cited; Dearing v. Bank of Charlestown, 5 Ga., 497; 48 Am. Dec. 300; Beard v. Beard, 21 Ind. 327.

All those decisions but followed and applied the tenets and principles of natural justice and the general rule of the common law, and, indeed, of international law.

Wheaton, in his work on International Law, says, at p. 288:

"The practice which prevails, in some countries, of proceeding against absent parties" (foreigners), "by means of some formal public notice, like that of the viis et modis of the Roman civil law, without actual personal notice of the suit, can not be reconciled with the principles of international justice." Yet he says the judicial power of every State extends to "all civil proceedings in rem, relating to real or personal property within the territory," Id. 280, and to "all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated." Id. 285. Burge, in his Commentaries on Colonial and Foreign Law, p. 1044, tells us: "The authority of every judicial tribunal and the obligation to obey it are circumscribed by the limits of the territory in which it is established.

Story in his Conflict of Laws, sec. 539, declares:

103 "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of this sort beyond this limit is a

mere nullity, and incapable of binding such persons or property in any other tribunals." And in Picquet v. Swan, 5 Mason, 40, he said: "The courts of a State, however general may be their jurisdiction, are necessarily confined to the territorial limits of the State. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of King's Bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appear*nace*, or justify a judgment against persons residing therein at the time of the commencement of the suit."

That doctrine is tersely stated thus in Dearing vs. Bank, 5 Ga., 497, 48 Am. Dec. 313: "The rule is firmly fixed that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. This is the rule by the law of nations—by the common law, and is recognized by the American courts. Dig., lib. 2, tit. 1, 1, 20; 1 Boullenois' Pr. Gen. 1, 2, pp. 2, 3; Battel, b. 2, c. 8, sec. 84; Picquet v. Swan, 5 Mason 35, 42; Story's Conf. L., 450, sec. 539."

In discussing the above mentioned Act of Congress, relating to judgments, the Supreme Court of the United States said, in 1850:

"International law, as it existed among the States in 1790 was.
104 that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force." D'Arcy v. Ketchum, supra.

As to the common law:

In violation of the principles of the "law of the land," as embodied in Magna Charta, parliament, at various times passed confiscatory acts, such as bills of attainder and bills of pains and penalties, against distinguished personages, resulting in much ill-feeling and bitterness among the people.

Among them may be mentioned the act exiling and disinheriting the Despencers, which a later parliament reversed upon the ground that "said award was made without calling them to answer, and without the assent of the prelates, which are peers of the realm in Parliament, and against the Great Charter of the franchises of England"; the Act against the Earl of Arundel, and the Act against Roger, Earl of Mortimer, each of which was likewise reversed, upon similar grounds. In the fourteenth century attainders of treason were common, as "a device of the dominant faction to secure forfeiture of estates." The Duke of Gloucester, Cromwell, and others were attained, after death, as were Lord Edward Fitzgerald and others by the Irish Parliament in 1798. Other such acts were those against the Countess of Salisbury, Lord Admiral Seymour, and Sir John Fenwick, respectively. Among notable bills of pains and
105 penalties were those against the Bishop of Atterbury, and Queen Caroline, respectively. McGehee, Due Process of Law, Ch. 2.

While it is true that in Art. 1, Sections 9 and 10 of the Constitution of the United States specific provision is made against the passage of any bill of attainder whatever, by the Congress or by any State legislature, we may well assume that it was at least in contemplation of those signal acts in violation of the ancient "law of the land" in England, and probably, partly, as an additional safeguard against such legislative experiences in this country, without notice to the victim, that the "due process" clauses of said Fifth and Fourteenth Amendments were adopted.

In early English history the blood-*fued* afforded the only means of redress for injury. It was largely supplanted by the custom of voluntarily referring the controversy to an arbitrator for award of damages. Jenks, Law and Politics in Middle Ages, 100, et seq.; Maine, Ancient Law, 3rd Am. Ed. 364; Holmes, Com. Law, 3.

The ancient principle of the common law, which forbade judgment against any one until he had personally appeared (2 Poll. & M. Hist. 592, Blackstone's Comm. Bk. 4, 283), is, perhaps, but the impress of that voluntary practice.

After courts were established by law, the theory which prevailed was that consent of the defendant was indispensable to the jurisdiction; and appearance in private actions evidenced consent. McGehee, Due Process of Law, Chap. 3. The effort of the government to compel, by process, such consent by appearance resulted in providing for the circumlocutory proceedings of outlawry, which in-
106 volved first, a judicial sentence of qualified forfeiture of the defendant's lands and goods, and a suspension of his civil rights as a citizen, and, second, a civil action to the Court of Exchecquer, or by petition, when the claim exceeded 50 pounds, resulting in satisfaction of such claim by sale of property so seized. Allowed, originally, in cases of felony only, that proceeding was extended to actions for trespass vi et armis, and, in the times of the Henrys, III and VII, and of the Edwards, I and III, to various civil actions. Blackstone, Book 3, Ch. 19.

In proceedings of outlawry the practice with regard to an absconding debtor was to issue, if necessary, successive writs, original, capias, alias, and pluries, and if all were returned non est inventus, to issue the exigent, or exigi facias, which required the sheriff "to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and, if he does, then to take him as in a capias": but if he did not appear, and was returned quinto exactus, he was then outlawed by the coroners of the county. By statutes 6 Hen. VIII, c. 4, and 31 Eliz. c. 3, there was issued, with the exigent, a writ of proclamation under which the sheriff of the county of the defendant's residence was required "to make three proclamations thereof in places the most notorious and most
107 likely to come to his knowledge" a month before the outlawry: 3 Blackstone, Ch. 19. In Tynte v. The Queen, in 1845, Lord Denman being Chief Justice, a judgment of outlawry was reversed, after the lapse of one hundred and sixteen years, because the record failed to show that proclamation had been made, or a writ of proc-

lamation issued, as required by statute. Eng. C. L. Rep. A. & E. N. S. Vol. 7, p. 216.

Statutes authorizing service by publication have frequently been held to be in derogation of common law, resulting in the necessity of following them strictly, in order to acquire jurisdiction thereunder. Galpin v. Page, 18 Wall. 304, and cases cited.

Alderson, in Judicial Writs and Process, p. 313, tells us: "All constructive or substituted service of process must, to be effectual, be authorized by statute. It is a manner of serving process unknown to the common law."

His first proposition has generally been acted upon by the courts of this country as sound, although, in a proceeding in rem, in Grasmeyer v. Beeson, 13 Tex. 30, it was held that if the Act of 1840 operated repeal of a statute which provided for substituted service "it was competent for the courts, as matter of practice, to adopt a mode of making parties where the law prescribed none," citing Kegans v. Alcorn, 9 Tex. 25.

But in stating his second proposition Mr. Alderson probably goes too far—and he certainly does unless he refers to only the ancient and consuetudinary law of England, unaffected by known Acts of Parliament. Grigsby v. Reib, 105 Tex. 97, 153 S. W. 1154; Browning v. Browning, 3 N. M. (Johns.) 371, 9 Pac. 682.

In England, by way of exceptions to the general rule which required personal appearance of the defendant in both criminal and civil actions, various statutes, from time to time authorized, and the English courts customarily upheld the validity of, various forms of substituted or constructive service.

The Supreme Court of Minnesota said: "Although service by publication is of modern origin, there has always been some
108 mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally." Bardwell v. Collins, 44 Minn. 97.

Ordinarily, "at common law, the process or means of compelling the defendant to appear in court was: 1. Summons. 2. The writ of attachment, or pone, which is sometimes the first or original process. 3. The writ of distringas, or distress infinite. 4. The writs of capias ad respondendum and testatum capias; or, instead of these, in the King's Bench, the bill of Middlesex, and writ of latitat; and in the Exchequer, the writ of quo minus. 5. The alias and pluries writs. 6. The exigent or writ of exiqui facias, proclamations and outlawry." Mason v. Messenger & May, 17 Ia. 266; citing 3 Blackstone's Comm. 279, et seq.

With regard to the summons, Blackstone says: it is "a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriffs messengers * * * either in person or left at his house or land," and that "warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds (which stick or wand among the northern nations is called the baculus nunciatorious); and by statute 31 Eliz. c. 3, the notice must also be proclaimed on some Sunday before the door

of the parish church. The writ of distringas, he tells us, "is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which are called issues, and which by the common law he
109 forfeits to the King if he does not appear." He adds: "But now the issues may be sold, if the court shall so direct, in order to defray the reasonable cost of the plaintiff. In like manner, by the civil law, if the defendant absconds, so that the citation is of no effect, 'mittitur advesarius in possessionem bonorum ejus.' And here by the common, as well as the civil law, the process ended in case of injuries without force; the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the King's writ; and if he had no substance the law held him incapable of making satisfaction, and therefore looked upon all farther process as nugatory."

However, in cases of injuries by force, there was allowed the further process of the capias, and that writ came into later use in various civil actions of account, debt and detinue, and in all actions on the case. The capias called for bringing the body of the defendant into court.

The bill of Middlesex corresponded to the capias, and was designed to bring the defendant before the court of king's bench at Winchester, upon an accusation of trespass, real or supposed, so that, being before the court, he might be prosecuted for any other species of injury. If returned not served there was then issued the latitat, which authorized the sheriff of another county named therein to bring defendant's body into court.

In the exchecquer the original writ was the quo minus which alleged that the plaintiff was the King's farmer or debtor, and
110 that the defendant had injured him, "quo minus sufficiens existit, by which he is the less able to pay the King his rent or debt;" and thereupon the defendant was arrested, "as upon a capias from the common pleas." 3 Blackstone, Ch. 19.

In a case under statute 6 & 7 Vict. c. 76, Lord Chief Justice Cockburn, in 1864, declared British subjects subject to the criminal laws of England, no matter where the offense was committed. In re Tivnan, 5 B. & S. 679.

In Douglas v. Forrest, Executor, 4 Bing. 693, 1 Moore & Payne, 663, decided in 1828; it was held that assumpsit lies in the courts at Westminster on a Scotch decree, obtained against a native born Scotchman who was absent in India, for a debt contracted in Scotland, although the absentee was cited only by "winding a horn" and summoning him at the market cross at Edinburg and pier and shore of Leith, in compliance with the statute, 54 Geo. 3, c. 137.

In so deciding Lord Chief Justice Best said: "Can we say that a practice which the Legislature of the United Kingdom has recognized, and extended to other cases, is contrary to the principles of justice? A natural born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence owes obedience to those laws, particularly when

they enforce a moral obligation." And he added "We confine our judgment to a case where the party owed allegiance to the country in which the judgments are given against him, from being born in it, and by the laws of which country his property was, at the time these judgments were given, protected; and where debts were contracted in the country in which the judgments were
111 given, whilst the debtor resided in it." See, also, Buchanan v. Rucker, 9 East, 192.

Of a similar statute, the Act of 5 Geo. II, the Supreme Court of Georgia said, in 1848: "it applies alone to the subjects of Great Britain, and, adopted by us, it applies alone to the citizens of Georgia." 5 Ga. 497; 48 Am. Dec. 300.

It was said by an English court, in 1831:

"That a law of a British colony that in a suit instituted against an absent party the process should be served upon the King's attorney general in the colony, it not being expressly provided that the attorney general should communicate with the absent defendant, was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced." Becquet v. McCarthy, 2 B. & Ad. 951, 22 E. C. L. 220.

For the provisions of various Acts of Parliament authorizing judgments upon substituted or constructive service where the defendant was out of the realm, even though he had not absconded to avoid service, see Daniell's Pleading and Practice of the High Court of Chancery, (Perkins' ed.) Ch. 8.

Upon such fictions and through such persuasive measures were the English courts accustomed to secure the personal appearance of defendants, or, failing that, to render judgment nevertheless.

Following the English precedents, statutes providing for
112 some form of substituted or constructive service, most often by publication, have been generally enacted in this country. See dissenting opinion in Pennoyer v. Neff, 95 U. S. pp. 738 et seq., and other cases herein cited.

Grasmeyer v. Beeson, 13 Tex., 528 (decided in 1855), was an action in trespass to try title and for partition of land, under allegations that the defendant was "absent, in parts unknown." Citation by publication was made by order of the court, possibly in the absence of statute authorizing it. A curator was appointed, presumably before the repeal of the Spanish law which authorized it. He was cited, appeared and answered, and pursuant to the laws of the State of Coahuila and Texas (Decree 277, Art. 98), a guardian ad litem was appointed. In upholding the decree of partition therein Wheeler, Jr., said:

"By the Spanish law in force previous to the adoption of the common law (Partidas, 3, 2, 12; 6 M. R. N. S. 17), if a debtor was in captivity or absent, his creditors might require that a curator be appointed, against whom suits might be instituted. (And see note 2 of the Commentaries of Gregoria Lopez on L. 14. Tit. 14, Partidas 3; Escriche, Diccionario, Verbo Ansente.)"

"Neither the common law nor any statute of the Republic afforded a remedy in cases like the present as a substitute for that given by the previously existing law. In the common law practice the appearance of the defendant might be enforced by seizing his goods, or he might be proceeded against to outlawry, thus putting him out of the protection of the law, so that he would be incapable of bringing an action for the redress of injuries; and, of
113 course, of appealing from or otherwise questioning any judgment which might be recovered against him until the outlawry was reversed. It is more than questionable, perhaps, whether this proceeding could ever have been resorted to in this country; and if it could by the ancient common law it could only be for felony; and later in actions for trespasses vi et armis. (Co. Litt., 128.) It is only by statute in England that it lies in any merely civil action. (3 Bl. Com., 284.) The common law, therefore, afforded no remedy in a case like the present, and if the repealing clause of the act of 1840 operated a repeal of the law authorizing the appointment of a curator, and also of the provision for the appointment of an attorney ad litem, it took away all remedy in cases like the present, and left the citizen wholly without any remedy whatever for the enforcement of his rights of action against absentees and non-residents, unless it was competent for the courts, as matter of practice, to adopt a mode of making parties where the law prescribed none."

It was under conditions and circumstances reflected by the foregoing and like authorities relating to international law, the common law, the Spanish law, and such adaptations thereof as had been made in various states, that the Fourteenth Amendment was adopted. Is it strange then, that under it, the Supreme Court of the United States held, in Pennoyer vs. Neff, that constructive service will not support a personal judgment against a non-resident? We think not. The wonder is, rather, that any court in this country ever held to the contrary. But the history of the subject, which naturally impelled said decision in Pennoyer v. Neff, does not
114 seem to us to require or justify the extension or application by this court of that doctrine to an absent citizen.

Although previously, and even before the adoption of the 14th Amendment, that court had held the same way as to constructive service upon a non-resident, it seems that not until Pennoyer v. Neff was reached did it consider the subject exhaustively, as it did, under said amendment, in that case, at least so far as the facts therein went.

The majority and the dissenting opinion- each covered a wide range. That case immediately took and still holds rank as the leading one upon the question of the sufficiency of constructive or substituted service of any character as the foundation of a personal judgment against a non-resident, and some, including the majority of our said Court of Civil Appeals, regard it in the same light with reference to an "absent" defendant,—a citizen of the State in which such judgment is rendered, while others, including Associate Justice Hodges, dissenting, do not.

Neff sued Pennoyer for land lying in the State of Oregon. Neff claimed title under a patent from the United States; Pennoyer, under sheriff's sale by virtue of an execution under a personal judgment against Neff, in favor of Mitchell, rendered by an Oregon State court in another cause in which Neff, who was then a non-resident of Oregon, had been cited by publication only, under the Oregon statute, and had not appeared personally. As in the case at bar, the issue was as to the validity of a former personal judgment, and depended upon the sufficiency or insufficiency of a citation by publication only to support it.

The decision of the Supreme Court of the United States in Neff's favor, holding that such process did not afford him "due
115 process of law," wherefore said former judgment against him, based thereon, was void, rests, we think, upon the essential fact that he was, not a citizen of Oregon, but a non-resident.

However, in discussing therein the legal effect of such service, as applied to a non-resident—the single question raised by the facts and, therefore the sole issue for decision therein—Mr. Justice Field expressed, at length, certain views, which, it seems, he had long entertained, as to the extra territorial effect of process from State courts, which views, while susceptible of being restricted to the facts of that case, and in harmony with the decision of the majority therein, would, if applied to the facts of the case now before us, require here an affirmance of said decision of the Court of Civil Appeals, in favor of McDonald.

That the views so expressed by Mr. Justice Field, and his reasoning in support thereof, are applicable to the facts of this case, although Mabee was a citizen of Texas, and not a non-resident, is one of the two conclusions upon which rests said decision of our Court of Civil Appeals herein, and the majority opinion, by Associate Justice Levy. Referring to Pennoyer v. Neff, it says:

"The court stated the rules to be, (1), 'that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory,' and, (2), 'the other principle of law referred to follows from the one mentioned: that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory.'

116 "Neff * * * was a non-resident of Oregon and a citizen and resident of California, and in that particular fact the instant case differs. But the two cases are identical in the fact of the absence of the defendant from the State at the time of the publication. And it was to the fact of being beyond the reach of the process, and not to the status of citizenship, a majority of this court think that the court in that case was applying, as governing, the principle that a court has no power to extend its process beyond the limits of the State, and the laws of one State have no operation outside of its own territory."

The other ground of that decision herein is that natural justice is not satisfied by a citation by publication for an absent citizen, but requires, as in the case of a non-resident, personal notice within the State or entry of appearance.

In support of his views Associate Justice Levy cited the following cases:

Freeman v. Alderson, 119 U. S. 185. The real extent of that decision is that citation by publication, against a non-resident, in a suit over land, will not support a personal judgment for costs; citing Pennoyer v. Neff, 95 U. S. 714, and Cooper v. Reynolds, 10 Wall. 308, only.

Mr. Justice Field, again speaking for the court, after quoting from his opinion in Pennoyer v. Neff, did say this:

"To this statement of the law it may be added, what, indeed, is a conclusion from the doctrine, that whilst the costs of an action may properly be satisfied out of the property attached, or other-
117 wise brought under the control of the court, no personal liability for them can be created against the absent or non-resident defendant; the power of the court being limited, as we have already said, to the disposition of the property, which is alone within its jurisdiction."

But in applying said doctrine to an "absent defendant," unless he used that term as being synonymous with "non-resident," he evidently went beyond the facts of the case before him, and that, also, was dictum.

Wilson v. Seligman, 144 U. S. 41. Under a Missouri statute it was there held that "a notice served in another state upon a person alleged to be a stockholder, and who has never resided in Missouri, is insufficient to support an order charging him with personal liability." (Syllabus.) The statute required that "sufficient notice in writing" be given but failed to say where or how. That court said:

"The defendant never resided in Missouri, and was not served with process within the State. * * * Personal service of the notice within the jurisdiction of the court is essential to support an order or judgment ascertaining and establishing such liability, unless he has voluntarily appeared, or otherwise waived his right to such service, which he has not done in this case."

That falls far short, we think, of upholding the proposition that service by publication, pursuant to statute, upon an absent citizen, will not support a personal judgment.

Ellwood v. Marietta Chair Co., 158 U. S. 105, which is not in point.

118 Dull v. Blackman, 169 U. S. 243, wherein it was held that a personal judgment against a non-resident is not supported by personal service in a state other than that in which the judgment was rendered. It is significant, perhaps, that therein, Mr. Justice Brewer, speaking for the court, quoted as follows from Hart v. Sansom, 110 U. S. 151: "Such a decree, being in personam merely, can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction."

Associate Justice Levy refers, also, to Galpin v. Page, 18 Wall. 350, and Ableman v. Booth, 21 Howard, 506, both of which arose prior to the 14th Amendment. The former arose under a stat-e of

California which authorized a citation by publication, under certain conditions, when so ordered by the court; "but it nowhere appeared in the record that any application was ever made to the court or judge thereof for an order directing the publication, or that any such order was ever made."

Therein Mr. Justice Field, who spoke for the court, as he did in Pennoyer v. Neff, said:

"When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions."

119 In the latter case (Ableman v. Booth), the question of jurisdiction did not relate to process or appearance, but grew out of a conflict between a State court and a court of the United States, in matters involving the Constitution and laws of the United States.

Said opinion by Associate Justice Levy also cites these cases:

Tex. & Pac. Ry. Co. v. Gay, 86 Tex. 586; 26 S. W. 605. Held, "the Circuit Court in Louisiana had not jurisdiction over property in Texas, such as conferred upon it power to take possession of and administer it through a receiver or otherwise."

Therein it was said: "Whether want of jurisdiction arises from the fact that the thing to be affected by judgment and process of a court is without its territorial jurisdiction, or without its jurisdiction for any other reason is unimportant, for in either case the process is invalid because the court has not jurisdiction."

But that expression can have no relation to the point in issue here, unless it be first assumed that in said cause No. 5468 the District Court did not, by constructive service, acquire jurisdiction over Mabee, which assumption would render all citations useless.

Montanya v. Montanya (1896), 112 Calif. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. There the defendant was served by publication made in California and by personal notice delivered to him in France, all in compliance with statute. Speaking for the majority of the court, and construing Pennoyer v. Neff as does Levy, A. J., Temple, J., said:

120 "Conceding that the defendant and the children are all domiciled in California, although in fact absent from the State at the time of the commencement of the action and since, and that the constructive service of summons was sufficient to give the court jurisdiction to grant the divorce, did the court have the power to award to plaintiff the exclusive custody of the children and to allow alimony? I have concluded that it had no such power."

Three members of that court of seven concurred; but the other three, including the Chief Justice, vigorously dissented, denying that the "due process clause places such restrictions upon the power of the State over the absent children and the defendant, who, they found, was a native of California, and had lived his whole life there until he clandestinely took the children to France and fraudulently

acquired a domicile there to defeat the purposes of the suit, intending to then return with the children to his native State;" citing numerous authorities.

Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740, in which, says Chief Justice Levy, "it was held that mere publication would not as against a citizen gone out of the State be sufficient, but that the publication supplemented by mailing to him a notice was sufficient."

In that case the Illinois court said:

"But this statute does something more than require the publication of the notice. It requires a copy of the notice to be sent by mail, addressed to the defendant whose place of residence
121 is stated in the affidavit." That suit was upon scire facias to revive a personal judgment. Full compliance with said statute was shown. The statute provided that the certificate of the Clerk that he mailed the notice should be evidence of the fact; the Clerk certified that he mailed such notice; the court held that to be prima-facie evidence that the defendant received the notice; also that the notice by publication and mail to "a resident of the State who could not be found in it" was sufficient, under the 14th Amendment and the State Constitution,—but not so as to a non-resident. But in Montanya v. Montanya, supra, the California statute provided for like personal notice by mail, which was also given in that case; yet the majority held it and citation by publication together insufficient to support the judgment against the absent citizen for alimony. So those two cited cases differ materially in principle, the opinion in the California case being the more extreme.

The Illinois case did say, "if the statute provided for bringing in a resident of the State by publication of the notice only, without the mailing of any notice to him, the same objection might lie as in the case of a non-resident;" but it does not definitely appear, and they were not called upon to say, whether, had their statute omitted provision for mailing notice, as does our Art. 1874, they would or would not have held it unconstitutional as applied to an absent citizen. (See our R. S. Arts. 1869-70, relating to personal notice "where the defendant is absent from the State or is a non-resident.")

In holding notice by publication and mail good as to an absent citizen, yet expressly declaring, as they did, concerning a non-resident, that "the judgment of revival cannot be regarded as valid if such non-resident has not been personally served or has not entered his appearance, but has only been served by publication and the mailing of a notice to him to his residence outside of the
122 State," the Illinois court plainly recognized a vital difference in the effects of the "due process" clause upon "absent citizens" and "non-residents." That case adds but little, if any, force to the views in support of which it is so cited.

Smith v. Grady, Ex'r (Wis.) 31 N. W. 477. There a personal judgment by a Canadian court was held void because it was based

solely upon service made upon the defendant in that action, personally, in Wisconsin, there being no personal appearance. When the debt arose defendant resided in Ontario, where said judgment was rendered, and was a subject of Great Britain, and so remained unto death, but, when so served with process, was not a resident of Ontario and had no property there. Said proceedings were found to be regular, under the laws of Ontario, which authorized said judgment. That decision rests squarely upon the proposition that "jurisdiction cannot be acquired or exercised over persons or property without the territorial limits of the government where the court sits," by "service of process in another State or foreign country." That was not attempted in the case at bar.

Another case, not cited by Associate Justice Levy, in which the majority opinion strongly supports his views as to the effect of Pennoyer v. Neff, is Raher v. Raher, 150 Ia., 511, 129 N. W. 494, Ann. Cas. 1912, D. 680 decided in January, 1911, wherein it was held that statutory provisions authorizing personal service of notice without the State on a defendant resident within the State violate the due process clauses of the Constitution of that State and of the Fourteenth Amendment. But from the argument in the
123 majority opinion two members of the court, one being the Chief Justice, dissented.

On the other hand, the dissenting opinion, in the case at bar, by Associate Justice Hodges treats, not only the decision in Pennoyer v. Neff, but the views expressed therein and the reasoning of Mr. Justice Field in support thereof, as applicable solely to non-residents. Said dissenting opinion declares, in substance, that the sovereign power of the State follows its citizens, wherever they may go, to such extent as to justify the rendition by one of her courts of a personal judgment against him, such as was said District Court judgment in No. 5648, based upon constructive service in accordance with the provisions of her statutes. To that effect, it says, are previous decisions of this court, and the views of various text-writers. It points out the difference which exists in the relations between the State and her citizens, upon one hand, and the State and a non-resident, upon the other hand, and finds therein what its author considers a sufficient reason for holding constructive service upon the former sufficient to support a personal judgment against him, in that he is constructively ever present in the State which then accords to him the rights and privileges of citizenship. It refers to the settled practice, under State statutes, of requiring foreign corporations seeking admittance to do business within the State to designate therein an agent for service, and asks:

"Is it going too far to say that one who takes up his residence within the State invokes the protection of its laws, and enjoys its rights and immunities, shall be held to have consented that
124 he may be served with notice by publication when temporarily beyond its limits?" And it cogently sums up the whole matter thus: "To hold that constructive notice is binding on an absent defendant is not giving such service extra-territorial effect,

but is merely saying that the absent citizen is amenable to its intra-state effect."

Among authorities cited by Associate Justice Hodges in support of his views are these: Knowles v. Gaslight and Coke Co., 19 Wall. 59, wherein the court said, in 1873:

"We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the State. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears."

Northcraft v. Oliver, 74 Tex. 162, 11 S. W. 1121; Fernandez v. Casey, 77 Tex. 452, 14 S. W. 149; Horst v. Lightfoot, 103 Tex. 643, 132 S. W. 761; Treadaway v. Eastburn, 57 Tex. 209; Bickerdike v. Allen, supra; Re Denick, 92 Hun. 161, 36 N. Y. Sup. 518; Montanya v. Montanya, supra, dissenting opinion; Freeman on Judgments, Sec. 570; 2 Black on Judg. Sec. 907.

These conflicting opinion- from our Court of Civil Appeals
125 fairly illustrate the status of decisions throughout the country as to the relation, vel non, of Pennoyer v. Neff to personal actions against absent citizens, and succinctly outline the principal reasons which, in other States, have naturally led to conflicting decisions and dissenting opinions.

Aside from the reference to Cooper v. Reynolds, 10 Wall. 308, Pennoyer v. Neff affords strong intrinsic evidence tending to support the view that it was not meant to announce any rule concerning absent citizens. If it did it was, to that extent, mere dictum, Neff being a non-resident.

We make these excerpts:

"Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced."

"Inhabitants," we may fairly assume there includes "citizens."

Hinds v. Hinds, 1 Ia. 36;
Ex parte Shaw, 145 U. S. 444;
Potter v. Ross, 23 N. J. L., (3 Zab. 517;
Boardman v. Blackford (Vt.), 2 Aikens 345;
Barnett's Case (Pa.), 1 Dall. 152;
Sears v. Boston, 42 Mass. 1 Metc. 250.

126 If so, the excerpt stands as a sweeping assertion of what may be termed the sovereign right of control of a State over its citizens, whether they be within or without its borders.

After conceding the sufficiency of constructive service as a basis for judgments, of various kinds, in rem, said opinion says: "But

* * * where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose"—the very heart of the decision upon the facts there involved, emphasis being laid, apparently, upon "non-resident." And, as though still having only non-residents in mind, it adds: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear."

It also says:

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory." For example, it refers
127 to divorce proceedings against a non-resident.

The sole purpose in making exceptions from the general rule so set forth in said first excerpt seems to have been to make plain the fact that in the excepted classes of cases the sovereign power of the State extends to even non-residents.

Said opinion closes thus:

"The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."

In short, the case was one against a non-resident, and in legal effect, it is with them only this it deals. The fact that the exceptions therein made do not include absent citizens is without significance, because the facts of that case did not reach them. It is reasonable to suppose that had that court intended to hold or say that the doctrine of that case was applicable to them the declaration would have been made with unmistakable clearness and force.

But while the references in that opinion to Cooper v. Reynolds, supra, are not satisfactorily clear in meaning, it must be conceded that they may reasonably be considered as amounting to an abstract assertion or intimation, at least, that in the entire matter of constructive service non-residents and absent citizens stand upon the same plane.

However, what was said by the court in that cited case, relative to the person judgment based upon citation by publication, was, itself, but dictum.

That action involved only a collateral attack upon a land title derived through sale under attachment based on an affidavit to the effect that defendants had fled from the State, or were in con-
128 cealment, etc., which affidavit, that court presumed, had been followed up by citation by publication, all in compliance with the Tennessee statute.

It was urged, in support of the collateral attack, that the attachment proceedings were irregular, that the affidavit was defective, and that notice was not published.

Held: Because of the attachment the proceeding became, "in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff; * * * when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice," citing Voorhees v. The Bank of the United States, 10 Peters, 449.

The effect of the original judgment in Cooper's Case as a personal judgment was not material to the decision, which, as a whole, plainly recognizes the fact that, when provided by statute, constructive service may be valid, under some circumstances, and to some extent.

Of said Voorhees Case the court, in Cooper's Case, said: it "was much like this. The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case," and there, as in the Cooper Case, the court held that irregularities complained of were not fatal in a collateral proceeding. The analogy consisted, it seems, not in non-residence, but in collateral attack upon attachment proceedings; which attack, in each instance, was held ineffective, the defendants in one case being absent citizens and the defend-
129 ant in the other case having been a non-resident.

But from the decision in the Cooper Case Mr. Justice Field dissented, briefly, upon the ground that in the original cause the State court "never acquired jurisdiction." That illustrates the extremity of his views in the matter of personal service within the State, whether the defendant be absent citizen or non-resident; but therein he stood alone, in Cooper's Case: and, inasmuch as that point was not involved in Pennoyer's Case, we may well assume that his views thereon, as therein expressed, amounted, at most, to a mere reiteration of his individual opinion upon an irrelevant matter. Quoting dictum in support of dictum cannot overthrow an established fundamental principle in American jurisprudence, nor justify State courts throughout the United States in striking down, as unconstitutional, statutes authorizing substituted and constructive service, or either, upon absent citizens.

The doctrine of Pennoyer v. Neff, as to non-residents, is now settled law throughout the United States.

Hart v. Sansom, 110 U. S. 151;
Freeman v. Anderson, 119 U. S. 185;
Wilson v. Seligman, 144 U. S. 41;
Goldey v. Morning News Co., 156 U. S. 518;
St. Clair v. Cox, 106 U. S., 350;
Mex. C. Ry. Co. v. Pinkney, 148 U. S., 194;
Dewey v. Des Moines, 173 U. S., 203.
Grannis v. Ordean, 234 U. S., 385.

Throughout the country State courts have generally followed it, some more strictly than others.

130 Prior to the decision in Pennoyer v. Neff this court held that notice by publication within this State, or personal notice without it, in compliance with our statutes, would support a personal judgment against a non-resident:

Butterworth v. Kinsey, 14 Tex. 500, (1885);

See also
McMullen v. Guest, 6 Tex. 275, (1851);
Campbell v. Wilson, 6 Tex. 379, (1851);
Mickie v. McGehee, 27 Tex. 135, (1863);
Wilson v. Zeigler, 44 Tex. 657, (1876).

But in each of those four cases the non-resident defendant entered an appearance, thereby submitting himself to the jurisdiction of the court; upon which point see York v. State, 73 Tex. 657, (1889), adhering to Pennoyer v. Neff, but construing our statutes relative to appearance and answer; also York v. Texas, 137 U. S. 15.

In Wilson v. Zeigler, supra, wherein Wilkinson had been cited by publication only, the trial court held: "Wilkinson, being a non-resident, and not being served with a citation, nor any property of his being in the State seized by process, the court has nothing before it to which the judgment of the court can be made to apply, and the court is without jurisdiction as to him," although he had filed an answer to the merits. In reversing and remanding that cause, this court, through Ireland, J., said:

"Personal judgments on service by publication are common to the proceedings in courts of most of the States of the Union, and their validity and force has been almost universally recognized within the jurisdiction where they are rendered. (Boswell's

131 Lessee v. Otis, 9 How., 350; Oakey v. Aspenwall, 4 Comst., 513; Nations v. Johnson, 24 How., 203; Freeman on Judgments, sec. 127.) * * * In this case there are three things shown by the record, either one of which gave the court jurisdiction over Wilkinson: 1st, it is shown that he had property in Colorado county; 2d, the plaintiff is a citizen of Colorado county; and, 3d, Wilkinson appeared by attorney, and answered. Of course in the two first cases mentioned there must have been service by publication or otherwise."

For a review of that case, see Stewart v. Anderson, 70 Tex. 588.

In Johnson v. Herbert, 45 Tex. 304, (1876), in an opinion by Chief Justice Roberts, this court said:

"The court erred in dismissing the petition, upon the ground of a want of jurisdiction, on account of the defendants being alleged to be non-residents. It was alleged that one of the defendants had property within the jurisdiction of the court," citing Wilson v. Zeigler, supra.

In 1853, in Liles v. Woods, 58 Tex. 416, the non-resident defendant having appeared and filed a plea to the jurisdiction, this court held: "It is unimportant whether he was a resident of the State or not."

And since said decision in Pennoyer v. Neff, this court in Rice v. Peteet, 66 Tex. 568, (1886), through Chief Justice Willis, upheld a personal judgment by a justice of the peace against non-resident defendants upon the ground that the citation, which was by publication only, was sufficient; saying, in substance, that our law
132 gave plaintiff the right to obtain an attachment on the ground that defendants were non-residents, but did not compel him to do so in order to be entitled to bring the suit; but another ground upon which jurisdiction was upheld was that defendants appeared and submitted the issues of law and of fact to the court, following Liles v. Woods, supra.

But speaking generally, this court has closely followed Pennoyer v. Neff, as to non-residents.

Since that decision was rendered this court has held that where, by attachment and statutory constructive service, or otherwise through such service, in the absence of an appearance, a State court acquires jurisdiction over a non-resident in a proceeding in rem, or quasi in rem, that jurisdiction does not extend beyond his property within the State, and will not support a personal judgment against him. Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295, (1888); Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921; Hochstadler v. Sam, 73 Tex. 315; Martin v. Cobb, 77 Tex. 546, 14 S. W. 163; Goodman v. Henley, 80 Tex. 499; Foote v. Sewall, 81 Tex. 659, 17 S. W. 373; Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191; Hardy v. Beaty, 84 Tex. 562. See, also, Kalmer v. Brown, 67 S. W. 1090.

And it seems that, except as above indicated, ever since said decision in Pennoyer v. Neff, this court, in applying our statutes, has uniformly followed the doctrine of that case as to non-residents, in cases involving personal judgments without attachment or personal appearance of a non-resident defendant, (1) when he had been served by merely personal notice in another State, Scott v. Streepy, 73 Tex. 547; York v. The State, 73 Tex. 651; Masterson v. Little, 74
133 Tex. 652, 13 S. W. 154; Kimmarle v. Ry. 76 Tex. 686, 12 S. W. 698; Brewing Co. v. Hirsch, 78 Tex. 192, 14 S. W. 450; Maddox v. Craig, 80 Tex. 676, 16 S. W. 328, (1891); and (2), when he had been served by merely publication within this State; Northcraft v. Oliver, 74 Tex. 162, 11 S. W. 1121, (1889), Horst v. Lightfoot, 103 Tex. 643, 132 S. W. 761.

But, this court, it seems, has never applied to absent citizens of this State the doctrine relating to non-residents which is enunciated in Pennoyer v. Neff. Indeed, it seems never to have considered that case applicable to absent citizens, or as intended to prescribe any rule as to them.

Traylor v. Lide, 7 S. W. 58, (1887), was an action of trespass to try title involving a collateral attack upon a personal judgment rendered by a justice of the peace in this State, under the justice's court Act of 1848, which, unlike the district court Act of that year, did not attempt to authorize service by publication against non-residents, but did provide for such service upon oath "(1) that the defendant is absent from the State, or (2) that he is a transient person, so that the ordinary process of law cannot be served upon him." (Hartley's

Dig. 1719.) The following is from the opinion of the Commission of Appeals therein, which this court adopted:

"It may be admitted that the process of a state cannot extend outside the territorial jurisdiction of the state so as to require a citizen of another state to respond to a suit against him, still it would not follow that a judgment upon constructive service, by publica-
134 tion, upon a person within the state, who is transient or secretes himself so that the ordinary process of law could not be served upon him, would not be a valid and binding judgment. Pennoyer v. Neff, 95 U. S. 715; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354. The authority is of the highest character that a judgment in personam against a non-resident, rendered by a state court upon service by publication, or even by personal service, is a nullity; but the reason and the authority both fail when the judgment is obtained by such service in a state court against its own citizens or against transient persons within the territorial jurisdiction of the state. Our supreme court has often held that when the law is strictly complied with, judgment upon service by publication will be sustained, even upon writ of error or on appeal, and by a much stronger reason when collaterally attacked. McMullen v. Guest, 6 Tex. 279; Hill v. Faison, 27 Tex. 428; Lawler v. White, Id. 250; Allen v. Wyser, 29 Tex. 150; Stephenson v. Railway Co., 42 Tex. 162; Hewitt v. Thomas, 46 Tex. 232; Moore v. Rice, 51 Tex. 289; Jones v. Jones, 60 Tex. 451; Brown v. Brown, 61 Tex. 45; Wilson v. Zeigler, 44 Tex. 667. If the affidavit is upon a ground not given in the statute, and that fact affirmatively appears, the judgment would be void. Stegall v. Huff, 54 Tex. 193. * * * We cannot assume facts that must be assumed if we conclude the Boswells were not residents of this State." See, also: Hambel v. Davis, 34 S. W. 439.

In O'Neill v. Brown, 61 Tex. 34, (1884), this court approved a decision by our Commission of Appeals which upheld the
135 validity of a personal judgment against a citizen of this State actually resident and present therein, based upon citation by publication only. And in Martin v. Burns, 80 Tex. 676, this court approved a decision of our Commission of Appeals in which, through Judge Marrs, it was said:

"It follows that as the records of the County Court do not affirmatively show that S. P. Crockett was a nonresident of this State when the citation was made, that the rulings of the court below in holding that the judgment of the County Court of Mitchell County was valid and binding in so far as the question of notice was concerned, and that it could not be collaterally impeached by proof of facts dehors the record, were correct. This conclusion is not in conflict with the doctrine of Pennoyer v. Neff, but is based entirely upon the absolute presumptions which the law indulges in support of a judgment of a domestic court of general jurisdiction and of the verity of its records. It must now be regarded as the settled rule of decision in this State that when applicable the chief principle announced in Pennoyer v. Neff will be observed, and that when it affirmatively appears from the record that a purely personal judgment has been rendered against

a nonresident, and citizen of another State, without appearance or waiver by him, upon citation by publication alone, or by process beyond the State, such judgment cannot be enforced and is subject to collateral attack. This is the extent to which the decisions
136 in this State go. Northcraft v. Oliver, 74 Texas, 169; Scott v. Streepy, 73 Texas, 547; York v. The State, 73 Texas, 651; Kimmarle v. Railway, 76 Texas, 695."

In Iams v. Root, 55 S. W. 411, (1900), our Court of Civil Appeals for the First District through Pleasants, J., said:

"There is no question as to the correctness of the proposition that, unless it appears from the record that the defendant was a nonresident of the state at the time this suit was brought and service was had by publication, the court in which the case was tried being a domestic court of general jurisdiction, and having jurisdiction of the subject-matter of litigation, it will be conclusively presumed, on collateral attack, that it had jurisdiction over the person of the defendant, and a personal judgment was properly rendered against him." Application for writ of error therein was refused by this court.

That excerpt was quoted approvingly by our Court of Civil Appeals for the Fourth District, in Gibson v. Oppenheimer, 154 S. W. 694, wherein Chief Justice Fly said, under a similar statute, Art. 1875 (1236):

"The sale made by virtue of the order of sale divested all of the right, title and interest of unknown heirs as fully as though they had been personally in court. They were inhabitants of Texas at the time they were cited by publication, and were bound by the laws of Texas in regard to citations by publication." In that case we denied a writ of error.

137 Hambel & Heasty v. Davis, 89 Tex. 256, 34 S. W. 439, involved a collateral attack upon a personal judgment rendered under the Act of 1870 by a Texas justice of the peace against a resident of Kansas, but who, for several months had been engaged in business in the county in which said judgment was rendered. Speaking through our present Chief Justice Brown, this court said: "If his place of permanent residence was in another state, but he was at the time within this State, and a transient person, he might be cited by publication. Traylor v. Lide, 7 S. W. Rep. 58."

In Northcraft v. Oliver, 74 Tex. 162, 11 S. W. 1121, (1889), this court, through Henry, J., said explicitly:

"The rule that service by publication only does not confer jurisdiction in our courts is adopted by us in deference to the authority of the case of Pennoyer v. Neff, 95 United States Reports, and we are not disposed to extend it beyond the doctrine announced in that case.

"We understand that authority holding that such service does not confer jurisdiction over a non-resident of the State does not extend any further, and we hold as heretofore that such service upon our own resident citizens made in pursuance of our statutes is binding.

"It is, however, a question of residence abroad and not of the acquisition of citizenship in the new domicile."

In Horst v. Lightfoot, 103 Tex. 643, 132 S. W. 761, this court through Williams, J., held:

138 "The allegation of the petition that the defendant was absent from the State, by itself, would not be inconsistent with the existence of power in the court to reach him with its writ, since one may be absent from the State and yet be a citizen of and resident in it, and therefore amenable to the process of its courts. But his absence may be because of non-residence, and this is what the petition and the affidavit for publication, construed together, show to have been true of Schneider; and it follows that jurisdiction over his person could not be obtained by constructive service."

In Fernandez v. Casey, 77 Tex. 452, 14 S. W. 149 (1890), this court, in an opinion by Henry, J., held, squarely:

"The facts we think clearly show that Fernandez was a resident citizen of the State of Texas, and that though he was temporarily absent from the State he had never acquired a domicile elsewhere. Under these circumstances we think that service by publication of process against him according to the provisions of our statutes conferred upon the Justice Court the jurisdiction that it exercised in rendering judgment against him."

It is true, as suggested in the argument filed herein by Defendant in Error in person, that in that case this court decided the point "in six lines, without giving a single reason or citing a 139 single authority"; yet, with precision and force, it therein upheld the validity of our statute, as applied to an absent citizen, although both Pennoyer v. Neff, supra, and Cooper v. Reynolds, supra, were invoked in behalf of appellant Fernandez. The ground of that decision by this court is made evident by the report of the case.

The doctrine enunciated in Fernandez v. Casey, supra, may be termed that of sovereign control, or, control by the State over its absent citizens.

The ground upon which that doctrine rests has been stated thus: "Every subject or citizen of a country where legal proceedings are instituted owes allegiance to his country and submission to its laws. He impliedly consents to be bound by its laws so long as he remains a citizen and resident; and when the State enacts a statute with reference to procedure every citizen of necessity consents, and no matter where he may be does not change that assent until he renounces his former allegiance and in fact becomes a non-resident."

Dissenting opinion in Raher v. Raher, supra. To the same effect is the dissenting opinion from our Court of Civil Appeals in the case before us.

This may be added: the laws of a State bind its citizens, whether they be considered as assenting thereto or not.

Among the authorities which support said doctrine of sovereign control with more or less force are these: Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287; 66 Md. 511; Henderson v. Stanifordl, 105 Mass. 504, 7 Am. Rep. 551; Mercantile Co. v. 140 Shoe Co. 51 Fla. 176, 4 L. R. A. (N. S.) 117, 120, Am. St. Rep. 153; Continental Bank v. Thurber, 74 Hun., 632, affirmed in 143 N. Y. 648; Ward Lbr. Co. v. Mfg. Co., 107 Va. 626, 17 L. R. A. (N. S.) 324; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A.

782; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Duval v. Johnson, 39 Ark., 182; Bimeler v. Dawson, 5 Ill. 536, 39 Am. Dec. 430; Harryman v. Roberts, 52 Md. 64; Henneman v. Thompson (S. C.), 8 Rich., 117; Huntley v. Baker, 33 Hun., 578; Cassidy v. Leitch, 2 Abb. N. C. 315; Biesenthall v. Williams, 1 Duv. 329, 85 Am. Dec. 629; Barrett v. Black, 25 Ga., 151; Hamill v. Talbott, 72 Mo. App. 22; Hinckley v. R. Co. 70 Minn., 105; 72 N. W. 835; Beard v. Beard, 21 Ind., 321; Holt v. Alloway (Ind.), 2 Blackf. 108; Re Denick, 92 Hun., 161, 36 N. Y. Supp. 518; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Campbell v. Campbell, 90 Hun., 233, 35 N. Y. Supp. 280, 693; Cole v. Holburg, 36 Kans. 263; Happy v. Mosher, 48 N. Y. 313; Spencer v. Houghton, 68 Calif. 87; Burnham v. Com. (Ky.) 1 Duv. 211; Gibbs v. Ins. Co. 63 N. Y. 114, 20 Am. Rep. 513; Welch v. Sykes (Ill.), 3 Gilman, 197; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Bank v. Bank, 87 Ia., 479, 54 N. W. 472; Galvin v. Dailey, 109 Ia., 332, 80 N. W. 420; Ins. Co. v. Pinner, 43 N. J. Eq., 52, 10 Atl. 184; Johnson v. Story Co., 148 Ia., 539, 126 N. W. 153.

In the majority opinion in Raher v. Raher, supra, decided Jan'y 19, 1911, it was said: "It must be conceded, however, that we have found no case in which it has been specifically held under pertinent facts that a personal judgment against a resident, who is actually served with notice outside of the territorial limits of the State is void." In the dissenting opinion therein it was said: "No court, so far as I have been able to find, has gone to the extent (to)
141 which the majority find it necessary to go in this case."

Black. on Judgments, 2nd Ed., says, in par. 227:

"Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon constructive notice only, and although he is temporarily absent from its dominions, and such a judgment must be everywhere recognized as valid and of binding force and effect." See also par. 907.

Freeman on Judgments, 4th Ed. par. 570, says: "In relation to the extra territorial effect of a judgment procured against a person in the State of his domicile, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that State, radical and irreconcilable differences of opinion exist. * * * The position, however, which seems to be the best sustained, both by reason and by precedents, is that each State has the authority to provide the means by which its own citizens may be brought before its court; that the courts of other States have no authority to disregard the means thus provided, and finally, that every judgment or decree obtained in a State against some of its citizens, by virtue of a lawful though constructive service of process, should be as obligatory upon such citizens in every other State as it is in the State whence it is taken."

Mr. McGehee, in "Due Process of Law," p. 54, thus sums up the result of his thorough study of the subject:

142 "If a particular procedure is found to have been sanctioned by English practice and adopted as suited to the conditions in this country, it measures up to the requisites of due process;" though, as he suggests, other procedure may do so.

Grover & Baker Machine Co. v. Radcliffe, supra, was an action brought in a State court in Maryland by the Machine Company against James Benge and John Benge, then citizens of Delaware, by summons and attachment on warrant, which was served on Radcliffe as garnishee, who thereupon filed pleas on behalf of the Benges, according to the Maryland practice, thereby putting in issue the validity of the judgment which the declaration made the basis of said action; said judgment having been rendered in 1874, by a prothonotary of Pennsylvania, under a statute of that State, without citation of service upon either of the Benges, but upon an instrument which had been executed by them at a time when James Benge was a citizen of Pennsylvania and John Benge was a citizen of Maryland, said instrument being a bond, in favor of the Machine Company, which contained the provision "we hereby authorize any attorney of any court of record in the State of New York or any other State to confess judgment against us for the said sum, with release of errors, etc."

Said Pennsylvania statute provided for entry of judgment upon such bond, etc., "without the agency of an attorney, or declaration filed." Holding that said statute did not authorize said judgment, the Maryland trial court instructed a verdict for the garnishee, Radcliffe, and, upon appeal, that action was affirmed by the Court of Appeals of Maryland (66: 501), in an opinion which held

143 that as the amount due on the bond was not expressed therein and could not be ascertained by calculation from anything appearing upon its face the case probably did not come within the purview of the Pennsylvania statute, but that, in any event, as to John Benge the judgment so entered by the prothonotary was void because: "He was a citizen and resident of Maryland, both when the bond was executed, and when the judgment was entered, and it is land, alleged to be his, located in Maryland, which is sought by this attachment to be condemned for the satisfaction of this judgment. He was never served with process never appeared in person or by attorney," etc.

That decision and its reasoning relative to want of jurisdiction of the Pennsylvania Court over the non-resident, John Benge, were approved by the Supreme Court of the United States (137: 287), in an opinion by Chief Justice Fuller, which said:

"John Benge was a citizen of Maryland when he executed this obligation. * * * The record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court."

And in discussing the effect of the Pennsylvania statute, it said: "But we do not think that a citizen of another State than Penn-

sylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Benge
144 authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every State in the Union relating to the rendition of judgment against their own citizens without service of appearance, but on the contrary made such appearance a condition of judgment."

It is significant, we think, that neither the Court of Appeals of Maryland nor the Supreme Court of the United States held said Pennsylvania judgment invalid as to James Benge, whose status with regard to it is not shown to have been different from that of John Benge, with the single exception that when they executed said bond, etc., the latter was a citizen of Maryland, but the former was a citizen of Pennsylvania.

It is shown that when suit was brought in Maryland both James and John Benge resided in Delaware, but it does not appear to what State the fealty of either, as a citizen, was due when the Pennsylvania judgment was rendered. In dealing with it neither of said decisions treated James Benge as a citizen of Pennsylvania. We think it fair to assume that the Court of Appeals of Maryland and the Supreme Court of the United States, each, considered that judgment valid as to James Benge, under the Pennsylvania statute, because he was a citizen of that State, at least when he executed said bond, etc., and, therefore, was to be treated as assenting to and bound by its law relating to the effect to be given to such an instrument as a basis for such judgment. Both of said decisions cite Pennoyer v. Neff approvingly.

145 However, as though to draw, in rugged outline, the fundamental distinction between the rule applicable to non-residents, under which said Pennsylvania judgment was held void as to John Benge, the non-resident, and the rule applicable to citizens, under which, we infer, said judgment was not held void as to James Benge, the citizen, that great tribunal which, ultimately, must settle, for the States, the constitutional question here involved, said, also:

"Publicists concur that domicil generally determines the particular territorial jurisprudence to which every individual is subject. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters, their domicil is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defense, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had

not been served with process, and did not enter his appearance. Whart. Conflict Laws, Secs. 32, 654, 660; Story, Conflict Laws, Secs. 539, 540, 586."

146 That such was the thought and purpose of the Supreme Court of the United States is made plain by an examination of the authorities so cited.

From said work by Mr. Wharton, (3rd Ed., Parmele), we make these extracts:

"Par. 32. * * * In several important relations, therefore, as is well shown by Savigny, domicil determines the particular territorial jurisprudence to which every individual is subjected."

Par. 654. "A foreign judgment, as we have seen, is impeachable for want of jurisdiction; and hence, for want of personal service within the jurisdiction, on the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment." Note 3, by reference, after stating the rule as to non-residents, adds: "It is otherwise however, when the defendant is a resident of the State in which the judgment is rendered, though absent therefrom at the time."

Par. 660. "It is competent for the defendant, however, to an action on a judgment of a sister state, as to an action on a foreign judgment, to set up as a defense, want of jurisdiction of the court rendering the judgment; and, as indicating such want of jurisdiction, to aver by plea that the defendant was not an inhabitant of the state rendering the judgment, and had not been served with process, and did not enter his appearance; or that the attorney was without authority to appear."

The following excerpts are from the 8th Edition of said work by Mr. Story:

147 Par. 539. * * * "The laws of a sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situate."

Par. 540. * * * "These (persons) may be either citizens, native or naturalized, or foreigners. In regard to the former, while within the territory of their birth or of their adopted allegiance, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled; and it ought to be respected everywhere. But as to citizens of a country domiciled abroad, the extent of jurisdiction which may be lawfully exercised over them in personam is not so clear upon acknowledged principles. It is true that nations generally assert a claim to regulate the rights and duties and obligations and acts of their own citizens, wherever they may be domiciled. And so far as these rights, duties, obligations and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement or for protection or for remedy, there may be no just ground to exclude this claim."

Par. 586. * * * "In order however to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is (as

we have already seen) treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals."

148 It must be conceded, first, that it is only by implication that the validity of the Pennsylvania judgment was so recognized as valid, as against James Benge, and second, that the principle of sovereign control over the citizen, there plainly recognized, was not extended as far as it is necessary to go to uphold, in this case, jurisdiction of the District Court to render a personal judgment against Mabee, in cause No. 5468; yet we think said opinion by Chief Justice Fuller, tends strongly to support, in its full extent, the decision of this court in Fernandez v. Casey, supra. In their real or supposed bearings upon absent citizens we set Machine Co. v. Radcliffe over against Pennoyer v. Neff.

There can be no valid objection to the character of service herein, since notice by publication in a newspaper, such as was given in the case at bar, is one of the most reasonable and customary statutory forms of constructive service. 32 Cyc. p. 462, and Note 81.

It is generally held, and is sound in principle, that whenever, under the facts, any sort of constructive or substituted service is permissible and valid its kind or character is a matter of legislative discretion, provided, only, it "affords the party fair opportunity to appear and defend his interests." Townes' Tex. Pleading, 2 Ed. 44; Thouvenin v. Rodrigues, Stewart v. Anderson, Pennoyer v. Neff, all supra; Grannis v. Ordean, 234 U. S. 393; Antoni v. Greenhow, 107 U. S. 769; Sugg v. Thornton, 132 U. S. 524; Arndt v. Griggs, 134 U. S. 316; York v. Texas, 137 U. S. 15; Holden v. Hardy, 169 U. S. 366; Hooker v. Los Angeles, 188 U. S. 314; Bryant v.

149 Shute's Exr. (Ky.) 144 S. W. 32, and cases cited; Mason v. Messenger, 17 Ia. 261; Matter of Empire City Bank, 18 N. Y. 200; Beard v. Beard, 21 Ind. 321; Jarvis v. Barrett, 14 Wis. 591; Betancourt v. Eberlin, 71 Ala. 461; Harryman v. Roberts, 52 Md. 65; Raher v. Raher, 150 Iowa, 511, 129 N. W. 494; 35 L. R. A. (N. S.) 301; Johnson v. Story Co., 148 Ia. 539; Mut. Life Ins. Co. v. Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Bernhardt v. Brown, 118 N. C. 700, 36 L. R. A. 402; Nelson v. Ry. 225 Ill. 197, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133, 80 N. E. 109; Freeman on Judgments, Sec. 127; Sedg. on Const. of Stat. and Const. Law, 2nd Ed., 476.

It certainly cannot be said that the process here under review, and such notice as it probably afforded to Mabee are contrary to the tenets of international law, or that they are not fully as consonant with the behests of natural justice as those which have long been upheld by the Supreme Court of the United States in various classes of cases, against non-residents in proceedings in rem, or quasi in rem, etc., affecting, more or less directly, the public welfare, such conclusions being based upon considerations of public necessity, and in cases against non-residents involving assent in advance by the defendant.

And in many cases essentially similar to said District Court cause No. 5468, involving the same vital principle relative to absent citi-

zens, service by publication, or in some statutory form of no greater intrinsic merit, so far as imparting actual notice to the defendant is concerned, has been upheld, almost from time immemorial, by most English speaking courts wherein the issue has arisen, and has been approved in this country in all modern times by the
150 most eminent and able writers on law.

The above quoted provisions of R. S. Art. 2026, relating to new trials, have been construed liberally in favor of judgment debtors. Wiseman v. Cottingham, recently decided by this court, in which the citation by publication was against unknown heirs, under R. S. Art. 1875 (1236). See also: Cundiff v. Teague, 46 Tex., 475; Miles v. Dana, 36 S. W. 848; Brown v. Dutton, 85 S. W. 454.

Mabee is not shown to have even attempted to avail himself of their benefits, nor not to have had timely knowledge of that judgment against him. On the contrary, in this action he pleads said judgment in bar, and relies upon it as a valid personal judgment against him.

The attack here made upon said district court judgment being, substantially, one against the constitutionality of the statute which authorized it, should not be sustained unless said statute is plainly invalid. We cannot say that it is unconstitutional. On the contrary, regarding legal principles as of more consequence than are abstract definitions, we are of the opinion that the doctrine of Fernandez v. Casey, supra, which has become a rule of property in Texas, is sound, and that our statute which is here drawn in question, Art. 1874, is not repugnant to either of the foregoing constitutional provisions, and said District Court judgment is, therefore, a
151 valid and subsisting judgment against Mabee, binding upon him as an absent citizen of Texas, and, consequently, good against the collateral attack so made upon it. As to Mabee, the cause of action upon the note, asserted in this suit, merged into that District Court judgment Bute v. Brainerd, 93 Tex. 137, 53 S. W. 1017.

The judgment of the Court of Civil Appeals herein is reversed and that of the County Court is affirmed.

WILLIAM E. HAWKINS,
Associate Justice.

Opinion delivered Apr. 14, 1915.

(Endorsed:) No. 2299. F. A. Mabee vs. Henry D. McDonald. Opinion. Judgment of the Court of Civil Appeals Reversed and Judgment of County Court Affirmed. Filed in Supreme Court Apl. 14, 1915. F. T. Connerly, Clerk. By H. L. Clamp, Deputy. Mr. Justice Hawkins.

152 *Opinion by Mr. Chief Justice Brown and Mr. Associate Justice Phillips.*

Filed April 14, 1915.

No. 2299.

F. A. MABEE, Plaintiff in Error,
vs.
HENRY D. McDONALD, Defendant in Error.

(From Lamar County, Sixth District.)

We concur in the determination that the judgment of the honorable Court of Civil Appeals should be reversed and that of the County Court should be affirmed, basing our opinion that the service by publication upon the defendant in the original judgment was valid, upon the undoubted principle of the amenability of the citizen of the State to its laws, the right of the State to provide by statute for that character of service upon an absent citizen, and the express previous decision of the question by this court in Fernandez vs. Casey, 77 Texas, 452.

T. J. BROWN,
Chief Justice.
NELSON PHILLIPS,
Associate Justice.

Opinion delivered April 14th, 1915.

(Endorsed:) No. 2299. F. A. Mabee vs. Henry D. McDonald. Concurring Opinion. Judgment Court Civil Appeals Reversed and Judgment of County Court affirmed. Filed in Supreme Court April 14, 1915. F. T. Connerly, Clerk. Mr. Chief Justice Brown. Mr. Justice Phillips.

153 *Judgment.*

Entered April 14, 1915.

No. 2299.

F. A. MABEE
vs.
HENRY D. McDONALD.

From County Court, Lamar Co., 6th District.

Opinion Delivered by Mr. Justice Hawkins.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District and the

original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals and these having been duly considered, because it is the opinion of this Court there was error in the judgment of the Court of Civil Appeals but that there was no error in the judgment of the County Court, it is therefore considered, adjudged and ordered that the judgment of the Court of Civil Appeals be reversed and the judgment of the County Court be affirmed; that the defendant in error, Henry D. McDonald and his sureties, N. H. Ragland and J. F. McReynolds, pay all costs in this behalf expended in this Court and in the Court of Civil Appeals and this decision be certified to the County Court for observance. Chief Justice Brown and Associate Justice Phillips delivering concurring opinion.

154 *Bond.*

Filed April 28, 1915.

HENRY D. MCDONALD, Plaintiff in Error,
vs.
F. A. MABEE, Defendant in Error.

Know all men by these presents, that we, Henry D. McDonald as principal and —— —— and —— ——, as sureties are held and firmly bound unto F. A. Mabee in the sum of Five hundred dollars to be paid to the said F. A. Mabee to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated 28th day of April A. D. 1915.

Whereas the above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Texas.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

HENRY D. McDONALD.
W. J. McDONALD.
C. McDONALD.

Bond approved, and to operate as a supersedeas. Dated April 28th A. D. 1915.

T. J. BROWN,
Chief Justice Supreme Court of Texas.

The above and foregoing bond agreed to be satisfactory.

LONG & WORTHAM,
Attorneys for F. A. Mabee, Defendant in Error.

155 (Endorsed:) Henry D. McDonald, Plaintiff in Error vs. F. A. Mabee, Defendant in Error. Bond. Filed in Supreme Court of Texas, April 28, 1915. F. T. Connerly, Clerk Supreme Court.

Summary of Costs.

Total Costs County Court of Lamar County, Texas	$40.15
Costs in Court of Civil Appeals, Texarkana, Tex.	29.75
Costs Supreme Court (exclusive transcript fee)	65.30
Costs Supreme Court, making trans. Sup. Ct. U. S.	77.50
Total Costs	$212.70

156 Clerk's Office, Supreme Court of Texas.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing one hundred and fifty-five pages contain a true and correct copy of the transcript of the record of the proceedings had in the County Court of Lamar County, Texas; in the Court of Civil Appeals for the Sixth Supreme Judicial District, Texarkana, Texas, and in the Supreme Court of Texas, as the same appear of record and on file in this office in cause No. 2299, F. A. Mabee, Plaintiff in Error, vs. H. D. McDonald, Defendant in Error.

I further certify that the Original Petition for Writ of Error; the Original Writ of Error; the Original Citation in Error and the Original Assignment of Errors are herewith attached to and returned with this record to the Clerk of the Supreme Court of the United States, copies of each being, on April 28th, 1915, lodged and now on file in this office; and that the original bond, of which true copy appears on page 154 hereof, was lodged with me as such clerk on said April 28th, 1915.

In testimony whereof I have hereto signed my name and affixed the seal of the Supreme Court of Texas, at the City of Austin, this the 10th day of May, A. D. 1915.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

157 Supreme Court of Texas.

No. 2299.

F. A. MABEE
vs.
HENRY D. MCDONALD.

Petition for Writ of Error.

Henry D. McDonald considering himself aggrieved by the final decision of the Supreme Court of Texas in rendering judgment

against him in the above entitled and numbered cause he hereby prays a writ of error, from the said decision and judgment to the Supreme Court of the United States and an order fixing the amount of supersedeas bond.

Assignment of errors presented herewith.

A. P. PARK,
Attorney for Henry D. McDonald.

STATE OF TEXAS,
Supreme Court:

Let the writ of error issue upon the execution of a bond by Henry D. McDonald payable to F. A. Mabee, in the sum of five hundred dollars, such bond when approved to act as a supersedeas.

Dated April 28th A. D. 1915.

T. J. BROWN,
Chief Justice Supreme Court of Texas.

157½ [Endorsed:] No. —. Henry D. McDonald, Plaintiff in Error, vs. F. A. Mabee, Defendant in Error. Petition for Writ of Error. Filed in Supreme Court of Texas, April 28, 1915. F. T. Connerly, Clerk.

158 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit between F. A. Mabee and Henry D. McDonald wherein was drawn in question the validity of a statute of or authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty of or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said constitution, treaty, statute or commission a manifest error *had* happened to the great damage of the said Henry D. McDonald as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 28th day of April in the year of our Lord one thousand nine hundred and fifteen.

[The Seal of the District Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the United States District Court
of the Western District of Texas.
By A. B. COFFEE, *Deputy.*

Allowed to operate as a supersedeas by

T. J. BROWN,
Chief Justice of the Supreme Court of Texas.

158½ [Endorsed:] No. —. Henry D. McDonald, Plaintiff in Error, vs. F. A. Mabee, Defendant in Error. Writ of Error. Filed in Supreme Court of Texas, April 28, 1915. F. T. Connerly, Clerk.

159 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to F. A. Mabee, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within Thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Texas, wherein Henry D. McDonald is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the state of Texas, this the 28th day of April, 1915.

T. J. BROWN,
Chief Justice Supreme Court of Texas.

Attest:

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk Supreme Court of Texas.

PARIS TEXAS, May 1st, A. D. 1915.

We, Attorneys of record for the defendant in error in the above entitled case, hereby acknowledged due service of the above citation, and enter an appearance in the Supreme Court of the United States.

LONG & WORTHAM,
Attorneys for A. A. Mabee.

159½ [Endorsed:] No. —. Henry D. McDonald, Plaintiff in Error, vs. F. A. Mabee. Citation. Filed in Supreme Court of Texas, May 3d, 1915. F. T. Connerly, Clerk.

160 Supreme Court of Texas.

No. 2299.

F. A. MABEE
vs.
HENRY D. MCDONALD.

Now comes Henry D. McDonald and files herewith his petition for a writ of error and says that there are errors in the record and proceedings in the above entitled case and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments:

First Assignment of Error.

The decision and judgment of the Supreme Court of Texas is in direct violation of the Constitution, statutes and laws of the United States more specially in violation of Section One of the Fourteenth Amendment of the Constitution of the United States and in effect deprives plaintiff of his property, to-wit: the note and cause of action asserted by him without due process of law in that the Supreme Court held that the judgment rendered by the District Court of Lamar County in Cause No. 5468 was a valid judgment in personam against F. A. Mabee when the record in that cause shows that such judgment was rendered on citation by publication based upon an affidavit that F. A. Mabee was absent from the state of Texas and that said F. A. Mabee at the times of the publication of the notice was actually absent from the state, had no other or further notice of the pendency of said suit and did not enter an appearance therein.

Second Assignment of Error.

The Supreme Court erred in holding that service by publication on F. A. Mabee in cause No. 5468 in the District Court of Lamar County, authorized and supported a judgment against said F. A. Mabee in personam; because to give the judgment such an effect would be depriving plaintiff of his cause of action without due process of law and would be contrary to Section One of the Fourteenth Amendment of the Constitution of the United States.

161 Third Assignment of Error.

The Supreme Court erred in holding and deciding that articles 1874 and 1941 Revised Civil Statutes of Texas were valid and being complied with empowered the court to render a personal judgment

against F. A. Mabee in Cause No. 5468 in District Court of Lamar County, Texas, the validity of which articles of the Statute were denied by Henry D. McDonald on the ground that same were in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States.

For which errors Henry D. McDonald prays that said judgment of the Supreme Court of the state of Texas, dated April 14th, A. D. 1915 be reversed and the decision of the court of Civil Appeals of the Sixth Judicial District of Texas be affirmed and judgment be rendered in favor of McDonald for his demand interest and costs and such other and further relief as he may be entitled.

A. P. PARK,
Attorney for Henry D. McDonald.

161½ [Endorsed:] No. —. Henry D. McDonald, Plaintiff in Error, vs. F. A. Mabee, Defendant in Error. Assignment of Errors. Filed in Supreme Court of Texas, April 28th, 1915. F. T. Connerly, Clerk.

Endorsed on cover: File No. 24,741. Texas Supreme Court. Term No. 135. Henry D. McDonald, plaintiff in error, vs. F. A. Mabee. Filed May 20, 1915. File No. 24,741.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916

No. 135

HENRY D. McDONALD, PLAINTIFF IN ERROR,

vs.

F. A. MABEE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in Error, by his petition filed on the 5th day of June, 1909, in the County Court of Lamar County, Texas, sought a recovery against F. A. Mabee, Defendant in Error, on a promissory note alleged to have been executed by him and one D. P. Hollon on March 6th, 1891, for the sum of $300.00, with interest and attorney's fees, if collected by law. Hollon was alleged to be wholly insolvent and was not made a party to the suit. Plaintiff in Error sued out an attachment and had the same levied on certain real estate as the property of Defendant in Error. Defendant in Error appeared and by his answer pleaded, as material to this appeal, that on October 3rd, 1893, the Plaintiff in Error obtained judgment against him and Hollon in cause No. 5468 in the District Court of Lamar County, Texas, on the note sued on, and with foreclosure of a Vendor's Lien on certain land for the purchase of which said note was given, and that said judgment was not appealed from and was final, and by reason of which the cause of action asserted by Plaintiff in Error became merged into that judgment and was a complete bar to this suit. Plaintiff in Error replying

to that part of the answer setting up a former judgment, alleged that at the time of the institution of the suit in the District Court Mabee was a non-resident of the State of Texas; that, erroneously supposing him to be a resident of Lamar County, Texas, he caused citation to issue to said county, which was not served on Mabee, but the return of the officer showed him to be absent from the State of Texas, whereupon Plaintiff in Error made an affadavit in said cause that Mabee was absent from the State of Texas, and praying that he be cited by publication, which citation was issued and published as required by law, and that the judgment rendered in said cause against Mabee was based on citation by publication, and so recites on its face; Wherefore, the judgment rendered thereon was not a valid judgment against him, except so far as it foreclosed the Vendor's Lien on the land within the jurisdiction of the court, and would not support an execution against his property generally.

The case was tried before the court without a jury, and the court found as a fact that Mabee in cause No. 5468 in the District Court of Lamar County, Texas, was cited by publication issued on application and affidavit stating that he was absent from the state, and that he was given no other notice of the suit and did not enter his appearance therein, and that the judgment against him was as disclosed on its face, based solely upon the citation by publication. The court further found: "I find that F. A. Mabee, at the time he joined in the execution of the note sued on, resided in Paris, Lamar County, Texas, and so resided up to the month of April, 1892, when he left Lamar County, Texas, to establish a home at some other place; but I find that Mabee's family continued to reside in Lamar County, Texas, until the spring of 1894, when they left, and have since had their home in St. Louis, Missouri. I find that F. A. Mabee in the month of April, 1892, left Paris and the State of Texas, and remained away until November, 1892, when he returned to Paris and remained in Paris during the said month of November, when he left again and went to St. Louis, Missouri, where he remained from January 1st, 1893, to January 1st, 1894, though his family still resided in Paris, Texas, from which place they moved to St. Louis in the spring of 1894. I find that from January 1st, 1893, to January 1st, 1894, defendant F. A. Mabee was absent from the State of Texas, but that his family resided in Paris, Texas, during that time and that he claimed Paris, Texas, as his residence, and that since the spring of 1894, he and his family have resided in St. Louis, Missouri."

The court further found that Mabee, though claiming Texas as his residence, was at the time of the suit and publication of the citation and rendition of judgment absent from the State of Texas and in St. Louis, Missouri. He was in St. Louis, Missouri, from December, 1892, to January 1st, 1894. The purpose of his leaving and absence from the State of Texas at the time was, as found by the court, "to establish a home in some other place," and he and his family in the spring of 1894 did remove to St. Louis, Missouri, and have since resided there. It was shown that the suit in question was filed on November 30th, 1892, to recover the amount of the note and to foreclose a lien on real estate in this State. Personal citation was issued to Mabee on De-

cember 29, 1892, retuarnable to the April term of court 1893. This citation was returned by the sheriff on December 30, 1892, not executed as to Mabee, and with the indorsement, "Learned to be out of the State of Texas." Citation by publication, under the statute of this state, then issued on Feburary 20th, 1893, and was duly published four weeks, ending March, 1893. Judgment was finally rendered on October 3rd, 1893, against Mabee personally for the amount of the note and execution awarded generally, as well as for foreclosure of the lien and sale of the land. The judgment on its face recited that it was rendered upon citation by publication based on the defendant's being absent from the State of Texas. The defendant in the suit had no notice of the suit, and did not appear.

The trial court on the facts so found concluded as a matter of law that the judgment so rendered by publication against Mabee and Hollon being on the same note on which this suit was based, was a valid judgment *in personam* against Mabee, and would have supported an execution in favor of plaintiff therein against the property of F. A. Mabee generally, and therefore merged the note into a judgment, and so concluding rendered judgment for defendant Mabee. (Transcript printed page 9).

McDonald filed his motion for a new trial urging as the second ground thereof that the judgment of the court was in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, and in effect deprived plaintiff of his property, to-wit: the note and cause of action asserted by him, without due process of law, which motion was over-ruled by the Court. (Transcript printed page 10). Thereupon on the request of plaintiff the court filed the conclusions of fact and law hereinbefore referred to separately as required by the Texas Statutes. (Transcript printed pages 11 to 16).

McDonald thereupon appealed the cause to the Court of Civil Appeals, an intermediate appellate court, and in his fourth and fifth assignments of error again urged that the judgment of the trial court was in violation of the Fourteenth Amendment, in that such judgment and its necessary effect deprived plaintiff of his property, to-wit, his note and cause of action, without due process of law. (Transcript printed page 19).

The Court of Civil Appeals by a divided court reversed and rendered the judgment in favor of McDonald, the opinion of the majority being delivered by Justice Levy, Justice Hodges dissenting. Justice Levy in so many words held that a Federal question was involved. The majority and dissenting opinions will be found on pages 22 to 35, inclusive, of the printed transcript.

After the over-ruling of his motion for a rehearing in the Court of Civil Appeals Mabee obtained a Writ of Error from the Supreme Court of Texas and on hearing this latter tribunal reversed the judgment of the Court of Civil Appeals and affirmed that of the County Court. (Transcript printed pages 87-88), and this is the judgment to revise which we have obtained this writ of error.

The specific and only question involved in this cause is this: Does the doctrine announced in Pennoyer v. Neff (95 U. S. 714) apply to a

judgment of a State Court rendered on service by publication only and where there is no appearance, against a defendant claiming his residence in the same State, but who was sued and cited by publication as being absent from the state, and the record showing that he was so absent when the suit was filed, when publication was made and when the judgment was rendered,—in fact so absent during the whole time from the institution of the suit to the rendition of the judgment, and this question is raised in the following assignments of error filed in the Supreme Court of the State of Texas with the petition for a Writ of Error, which assignments of error are here asserted and intended to be urged.

ASSIGNMENTS OF ERROR.

FIRST ASSIGNMENT OF ERROR.

The decision and judgment of the Supreme Court of Texas is in direct violation of the Constitution, statutes and laws of the United States, more specially in violation of Section One of the Fourteenth Amendment of the Constiution of the United States and in effect deprives plaintiff of his property, to-wit: the note and cause of action asserted by him without due process of law in that the Supreme Court held that the judgment rendered by the District Court of Lamar County in Cause No. 5468 was a valid judgment *in personam* against F. A. Mabee when the record in that cause shows that such judgment was rendered on citation by publication based upon an affidavit that F. A. Mabee was absent from the State of Texas and that said F. A. Mabee at the time of the publication of the notice was actually absent from the State, had no other or further notice of the pendency of said suit and did not enter an appearance therein.

SECOND ASSIGNMENT OF ERROR.

The Supreme Court erred in holding that service by publication on F. A. Mabee in Cause No. 5468 in the District Court of Lamar County, authorized and supported a judgment against said F. A. Mabee *in personam;* because to give the judgment such an effect would be depriving plaintiff of his cause of action without due process of law and would be contrary to Section One of the Fourteenth Amendment of the Constitution of the United States.

THIRD ASSIGNMENT OF ERROR.

The Supreme Court erred in holding and deciding that articles 1874 and 1941, Revised Civil Statutes of Texas were valid and being complied with empowered the court to render a personal judgment against F. A. Mabee in Cause No. 5468 in the District Court of Lamar County, Texas, the validity of which articles of the statute were denied by Henry D. McDonald on the ground that same were in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

From the beginning of this case in the County Court of Lamar County, Texas, on through that intermediate tribunal, the Court of Civil Appeals, and thence to the highest tribunal in the State, the Supreme Court of the State of Texas, and now on Writ of Error in this Court, the controversy has raged and yet rages around this Court's decision in Pennoyer v. Neff (95 U. S. 714). Defendant in error contends that the doctrine of that case applies only to a non-resident; we contend that it applies equally to a resident who, when cited by publication was *absent* from the State, and we give this extract from that celebrated case:

" * * * But in Cooper v. Reynolds, reported in the 10th Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an *absent* party, without the jurisdiction of the court," etc., and after quoting from Cooper v. Reynolds, says: "The fact that the defendants in that cause had fled from the State, or had concealed themselves, so as not to be reached by the ordinary process of the Court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the Court; and the grounds and the extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance, * * * * " and "the doctrine declared in the above citation received the approval of all the judges," page 726.

Pennoyer v. Neff thus in so many words makes no distinction between the case of a non-resident defendant cited when beyond the territorial limits of the State and an *absent* defendant, though a resident of the State, when similarly cited. To the same effect is the case of Freeman v. Alderson, 119 U. S. 190. The ground of this holding is declared to be that universal principle of public law that no State can exercise direct jurisdiction and authority over persons or property without its territory. From that principle as so declared and illustrated the Supreme Court of the United States has never departed, and its latest comment on Pennoyer v. Neff only reaffirms and emphasizes its adherence thereto. See Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189.

We cite also in support of the principle the following cases from this Court:

Wilson v. Seligman, 144 U. S. 41.
Freeman v. Alderson, 119 U. S. 190.
Cooper v. Reynolds, 10 Wallace 308.
Galpin v. Page, 18 Wallace 350.
Insurance Company v. Bangs, 103 U. S. 438.

In most of the cases from the Supreme Court of Texas and in some from other states which seem to be in accord with theSupreme Court's ruling in this case, the conclusion was evidently based on the principle that each State has the right to prescribe the mode of bringing parties before its courts and when so prescribed by legislative authority is

binding upon all who, at the time the notice is published, *are within the territorial jurisdiction of the State.*

Other principles, however, are involved in this case and we assert as rules well established, that no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decrees. Process from the tribunals of one State cannot run into another State and summon a party to leave such territory and respond to proceedings against him, and process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability. No State can exercise direct jurisdiction and authority over persons without its territory, whether they be absent from the state or domiciled in another State. *The test of jurisdiction over the person is determined by the fact as to whether or not he is within the territorial jurisdiction or physically absent therefrom.*

It may be that when constructive service is based on the fact that the defendant is a transient person or his residence unknown, that the Courts will in aid of the judgment presume that at the time of service by publication the defendant was within the territorial limits of the State and not beyond its borders, but if the record shows affirmatively that publication was based on non-residence, or absence from the State as in this case, there could then be no presumption indulged of the defendant's presence in the State and in such case a personal judgment would be void.

As shown by the expressions in Pennoyer v. Neff and all its other decisions involving the question this court regards as of no efficacy whatever as a basis for a judgment *in personam* any service by publication or other substituted service whatever whether made without or within the State where the defendant may happen to be. Pennoyer v. Neff contains these expressions:

"As was stated in a subsequent case, the doctrine of this court is that the act was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property *within one State* from the exercise of jurisdiction over them by another." (Citing the Lafayette Insurance Company v. French (18 How. 404) page 730.

Again its says: "And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its own citizens when exercising its conceded jurisdiction over their property within its limits." (Page 731).

Again: In deciding that a judgment *in personam* rendered upon service by publication only violates the "due process" clause of the Fourteenth Amendment, it says:

"To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." (Page 733).

The case of De La Montanya v. De La Montanya (112 Cal. 101) holds expressly that citation by publication against one having his domicile in the State where the suit is brought, but published when he is absent from and without the territorial limits of the State, cannot constitute the basis of a valid judgment *in personam*. Among other things the court says:

"It is as mch an invasion of a foreign jurisdiction to serve a citizen of the State in which the action was brought temporarily resident there, as it would be to summon from its borders a citizen of such foreign state. If such things could be done, who would determine where the domicile of a particular person really was? Domicile often depends upon secret intention. It would be a most unsatisfactory test." (Page 110). Other cases to the same effect are Smith v. Grady, 31 N. W. 477, and Bickerdike v. Allen, 41 N. E. 740.

The voluminous opinions of Justice Hodges of the Court of Civil Appeals, and of Supreme Court Justice Hawkins both come at last to the simple proposition and contention that the thing that differentiates this case from Pennoyer v. Neff is the matter of State *sovereignty* and the citizen's *allegiance* to the State, and Chief Justice Brown and Justice Phillips in a ten-line concurring opinion plant themselves upon what they call "the undoubted principle of the amenability of the citizens of the State to its laws, and the right of the State to provide by statute for that character of service upon an absent citizen."

The principle contended for by these judges is all right and unassailable unless it happens in a given case to run counter to a higher sovereignty and a greater allegiance. In a very limited sense there may yet be some small measure of sovereignty residing in the States and some semblance of allegiance due by a citizen of a State to his State, but in the broad and accurate sense sovereignty and allegiance in this country are now predicable only of the relations between the United States and *her* citizens. Most of the old doctrine of State sovereignty and allegiance was wiped out at Appomatox and what was left of it went down under the Fourteenth Amendment. Under the Amendment citizens of the State are also citizens of the United States, and the State is forbidden to deprive *any person* (whether citizen or not) of life, liberty or property, without due process of law.

A citizen of the State is also a citizen of the United States and the State is forbidden to do to one of its own citizens what it is not allowed to do to any citizen of the United States. The Fourteenth Amendment is directed against the States and any action of the State, legislative, executive or judicial, which results in depriving *any* person of life, liberty or property without due process of law is forbidden. And it must be true that a state of facts which amounts to a denial of due process in one case will amount to it in any case. No theory about sovereignty, allegiance and State control can alter this; to do so would be to make the same thing a matter of substance in one case and a shadow in another similar case.

Under Pennoyer v. Neff, "due process" exists or does not exist under a given state of facts and the same facts will always have the same result; according to the holding in this case it may or may not exist under the same state of facts; if the defendant happened to be a

non-resident the State court holds that the publication of notice would not be "due process;" if a citizen of the State, but absent from it for ever so long a time even for the purpose of establishing a home at some other place as here, the very same notice would be "due process." This latter theory cannot be reconciled with the doctrine of this court that the principles of natural justice require that a person shall have notice of a suit before he can be conclusively bound by its result.

The decision in Pennoyer v. Neff made it necessary that Texas as well as many other states should over-rule many of their decisions previously rendered in opposition to the holding in that case, but it was not always done gracefully and ungrudgingly. In the case of Northcraft v. Oliver, 74 Texas 162, the Supreme Court of Texas said that "the rule that service by publication only does not confer jurisdiction in our courts is adopted by us in deference to the authority of the case of Pennoyer v. Neff, 95 United States Reports, and we are not disposed to extend it beyond the doctrine announced in that case." And the opinion of Justice Hawkins in this case is, after all, but a labored attack on Pennoyer v. Neff. Justice Levy's opinion is so discriminating, luminous and convincing that we specially commend it to the court's attention.

Respectfully submitted.

HENRY D. McDONALD,
in pro. per. for Plaintiff in Error.

A. P. PARK,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1916

No. 135

HENRY D. McDONALD, PLAINTIFF IN ERROR,

Vs.

F. A. MABEE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR DEFENDANT IN ERROR.

The statement of the case made by Plaintiff in Error is substantially correct.

The facts are conclusive, and were so considered by each of the Texas Courts by which this cause was heard, that Mabee, Defendant in Error, against whom both a personal judgment and one in rem was rendered in favor of McDonald, Plaintiff in Error, in the original cause No. 5468, in the District Court of Lamar County, though a citizen of Texas and claiming Texas as his residence, was at the time of suit and publication of citation and rendition of judgment, absent from the State of Texas, and in St. Louis, Missouri. (Tr. Printed pages 14, 23, 29, 51.)

The sole and only question then for the determination of this Court is whether a judgment in personam, rendered upon service of citation to one absent from the state, by publication made in strict compliance with the laws of Texas, against one who had voluntarily subjected not only his property, but himself and his family to the laws of Texas by becoming a citizen of Texas, enjoying the rights, privileges and immunities of citizenship, whether such judgment is violative of the Constitution of the

United States as depriving such absent defendant, in this case the Defendant in Error, of his property without due process of law.

To this question, we shall therefore direct ourselves.

A personal judgment rendered against a citizen of the state on service by publication based on affidavit that he is absent from the state is valid and will support an execution against the property of the defendant generally.

One may be absent from the state and at the same time a citizen of the state, and a personal judgment against such absent citizen though rendered upon service by publication based on an affidavit of defendant's absence from the state, is valid and will support an execution against the property of defendant generally.

When from an inspection of the record of a court of general jurisdiction it is shown that a defendant against whom a personal judgment is rendered upon service by publication, was at the time of such service absent from the state in which such court is sitting, but it does not appear from an inspection of such record that at such time, such defendant was a non-resident of such state, the presumption is conclusive in a collateral attack upon such judgment, of its validity, though defendant never appeared or answered in the action.

The character of service had on F. A. Mabee in cause No. 5468 in the District Court of Lamar County authorized and would support a judgment in personam against said Mabee. To give such judgment such an effect in this proceeding would not deprive Defendant in Error of his cause of action without due process of law and would not be contrary to the statutes and laws of the United States as construed by the supreme court of the United States, nor contrary to section one of the fourteenth amendment of the Constitution of the United States.

The original suit of McDonald against Mabee was brought in the District Court of Lamar County, for the two-fold purpose of foreclosing a Vendor's Lien on 260 acres of land in Lamar County, sold by McDonald to Mabee and one Hollon, the latter not concerned in this action, as well as to recover a personal judgment on McDonald's Vendor's Lien note against Mabee and Hollon, McDonald's petition alleging that all of the defendants resided in Lamar County. Afterwards, McDonald made affidavit as preliminary to issuance and service of citation by publication, that Mabee was absent from the State of Texas. (Tr. Printed page 12)

There are four grounds under the Civil Statutes of Texas for the issuance of citation by publication, each distinct and different from the others: first, that defendant is a non-resident; second, that he is absent from the state; third, that he is a transient person; fourth, that his residence is unknown.

"Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person or that his residence is unknown to the affiant, the Clerk shall issue a citation for the defendant, addressed to the Sheriff or any Constable of the County in which the suit is pending. Such citation shall contain a brief statement of the cause of action and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, but if not, then in any newspaper published in the Judicial District where the suit is pending; but if there be no newspaper published in such Judicial District, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once in each week for four consecutive weeks previous to the return day thereof." (Article 1874, Vernon's Sayles' Texas Civil Statutes 1914.)

The statute law of Texas therefore clearly distinguishes between a non-resident of the state and one absent from the state, while the Supreme Court of Texas, prior to its holding from which this Writ of Error was taken, as clearly recognized the consistency of absence from the state, and at the same time citizenship in the state, as note this language from Horst v. Lightfoot, 132 S. W. Rep. p. 762: "The allegation of the petition that the defendant was absent from the state by itself would not be inconsistent with the existence of power in the Court to reach him with its Writ, since one may be absent from the state and yet be a citizen of and resident in it, and therefore amenable to the process of its Courts."

Out of deference to the ruling of this Court, in Pennoyer vs. Neff, the Courts of Texas since then have held that citation by publication against a non-resident alien would not support a personal judgment, but only a judgment in rem. They have consistently refused to extend this holding any further. And they have stood squarely on the power of Texas to prescribe for its citizens process giving jurisdiction to the Courts of Texas over their persons as well as their property, whether at the time of

the service of such process its citizens be in or out of the state. We contend that in these holdings the Courts of Texas have violated neither the letter nor the spirit of the Constitution of the United States as interpreted by this Court.

The Supreme Court of Texas, in Northcraft v. Oliver, 74 Tex. 162, makes clear that the validity to support a purely personal judgment of substituted service by publication upon the resident citizens of Texas made in pursuance of the Statutes of Texas, depends upon the question of residence abroad and not of the acquisition of citizenship in the new domicile, thus following the facts in Pennoyer vs. Neff, and recognizing the limitation upon the power of one state to send its process into another state and force the citizens of such other state to leave its territory and respond to proceedings against them in another state.

Out of wisdom born of experience was formulated that provision of our Federal Constitution which prevents the taking of any man's property other than by due process of law.

Each man must be given a tribunal for the hearing of his cause and his day in court by legal service of process.

If this means, as contended by Plaintiff in Error, and by the majority opinion in the Texarkana Court of Civil Appeals, that the citation in the original Lamar County District Court Cause No. 5468, would not support a personal judgment against Mabee because not served personally on him within the State of Texas, and therefore not notice to him of his approaching day in Court, upon what line of reasoning then can the other part of this judgment, the foreclosure of McDonald's Vendor's Lien on the 260 acres of Lamar County land be sustained? The citation, its service by publication, the affidavit to secure its issue, all were identical, and if they gave no such notice to Mabee of his day in Court as would support a personal judgment against him, how could the same process similarly served give him notice that his day in Court was approaching when his land in Lamar County would be foreclosed and sold as under execution? Yet under the Rule of Pennoyer vs. Neff the foreclosure part of the judgment is of unquestioned validity whether Mabee had been a citizen of Texas but absent from the State, or a citizen of New York, who had never set foot in Texas

Great stress is laid by Plaintiff in Error upon Pennoyer vs. Neff. We do not yield to him in his respect for this opinion, nor in our recognition of its binding force within the scope of the law therein laid down, as applied to the facts of that case, but we do reserve the right to refuse to extend the Rule further than

this Court has done in that case.

Neff was a non-resident of Oregon and a citizen and resident of California. This Court says the question there decided "respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein." (95 U. S. 736) The reasons given by this Court for the rule in that case are that "process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them," (95 U. S. 727) as being "the only doctrine consistent with proper protection to CITIZENS OF OTHER STATES." (95 U. S. 726) Reading this language with the facts in mind that Neff was not only a non-resident but a non-citizen of Oregon, we can understand why the Courts of Oregon could not force him to leave his state and answer to a purely personal action in their courts. Not because of any lack of notice to him of the pendency of the Oregon suit, because the same citation and the same service would support a judgment in rem enforceable upon Neff's property in Oregon, under attachment proceedings in that state.

If the citation was insufficient notice in the one case, why not in the other. The Oregon Court's lack of power over the person of Neff was therefore not due to his being beyond the reach of its process, but solely to his status of citizenship.

Every state has the right to provide for substituted service of citation upon a non-resident in proceedings to determine the civil status of one of its citizens towards such non-resident, as in divorce proceedings. (Opinion Justice Hawkins and cited authorities. Tr. Printed pages 73 & 74)

Every state has the right to provide for proceedings to subject, upon substituted service of citation, the real estate within the state, of a non-resident to the claim of one of its citizens. (Pennoyer vs. Neff, 95 U. S. 714)

Every state has the right to provide for substituted service of citation in favor of its citizens against corporations as a condition precedent to their right to transact business within the state, and this Court has gone so far as to uphold such substituted service as binding personally upon a non-resident stockholder. (Wilson vs. Seligman, 144 U. S. 45)

The Court in Pennoyer vs. Neff, in support of its reasoning, recognizes the power of a state to require non-residents entering into partnership or associational business within a state, or MAKING CONTRACTS ENFORCIBLE THEREIN, to submit them-

selves to service of process other than personal, within the state which will support a personal judgment rendered upon such substituted service alone. (95 U. S. 735)

Under the Texas Statute previously quoted, even though a defendant were permanently a resident of another state, but was at the time within the State of Texas, and a transient person, he might be cited by publication so as to support a personal judgment against him. (Opinion by Justice Brown in Traylor vs. Lide, 7 S. W. Rep. 58)

Plaintiff in Error cites and relies upon the opinion in Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189, as being the latest comment of this Court on Pennoyer vs. Neff, and its reaffirmance thereof, and its emphatic adherance thereto. In this last named case, a corporation not doing business nor having an office within the state was sued, and a resident director served with citation. The Court very properly held this to be violative of the due process of law clause of the Constitution, and denied to the state the power to extend its authority beyond its jurisdiction so as to condemn the resident of another state, in that case a corporation, a citizen of and domiciled in another state, when the corporation had subjected neither its property nor its person to the jurisdiction of the state.

This is the rule of Pennoyer vs. Neff. It is the rule of every decision by this Court since then. It has never been extended by this Court to a citizen who knowing the laws of his state, having submitted his person to such laws, entitled to certain rights, privileges and immunities by virtue of those laws, voluntarily absents himself from the state. To thus extend this holding would destroy the reason of the rule subjecting the property of a non-resident within the state to the process of the state, would take from a state its right to determine the civil status of one of its citizens as against a non-resident, would throw its gates open to foreign corporations and their transaction of business within the state untrammeled by any safeguards to the citizens of the state with whom they dealt; in its last analysis, would do what Plaintiff in Error, departing from the faith of his fathers and casting aside the immutable principles of his political creed, says has even now been done, and would take from the states their power to make their citizens amenable to their laws so long as they claimed the benefits from and the protection of such laws.

On no other principle than the implied agreement on the one hand, by the citizen who has submitted himself, his family, and his property to the laws of his state, and on the other, the for-

eigner who has seen fit to own property within the state, and thus subject it to the laws of the state, can any other than personal service within the state be sustained. Substituted service of citation by itself does not notify the defendant of the pendency of the suit where his real estate is held by attachment or his money or credits by garnishment, or when his civil status is to be determined as in divorce proceedings, any more than it serves as notice in a purely personaly action. It is, in itself, no better notice to the resident of the state within its borders, or to a non-resident temporarily within its borders, whose whereabouts are unknown, or who is a transient person, than it is in a purely personal action. But its power must and does rest solely upon the right of a state to compel its citizens, as well as those who though not citizens are protected in their property within its borders by its laws, to accept substituted service of process when by their own acts they render personal service upon them within the state impossible.

The exhaustive and learned opinion of Justice Hawkins of the Supreme Court of Texas, (Tr. Printed pages 48 to 86) and the very able dissenting opinion of Justice Hodges of the Texarkana Court of Civil Appeals, (Tr. Printed pages 27 to 35) we commend to the careful consideration of this Court.

In conclusion we respectfully submit that Mabee, the Defendant in Error here, and the Defendant in the original Cause No. 5468, being a citizen of Texas and resident in Texas, charged with a knowledge of the laws of Texas, submitting himself, his family and his property to the laws of Texas, entitled to the protection of these laws, enjoying the rights, privileges and immunities which they safeguarded, thereby became amenable to such laws and accepted and agreed to their provisions for substituted service of process in each and every respect provided by the Statutes. He was not a citizen of another state and therefore needed no protection against the laws of his own state. Whether absent from the state, his residence therein unknown, or a transient person within the state, he had consented to and could lawfully be served with process by publication which would support a personal judgment against him.

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Respectfully submitted.

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